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The Law Commission

Working Paper No 53

Family Law

Matrimonial Proceedings in Magistrates' Courts

7 September 1973

LONDON
HER MAJESTY'S STATIONERY OFFICE
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N.B.

This is a Working Paper circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

The Law Commission will be grateful if comments can be sent in by the end of March 1974.

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THE LAW COMMISSION

SECOND PROGRAMME - ITEM XIX

FAMILY LAW

WORKING PAPER NO. 53

MATRIMONIAL PROCEEDINGS IN MAGISTRATES' COURTS

1. In December 1970 the Home Secretary invited the Law Commission, in the course of its work under Item XIX of its Second Programme (the reform and codification of family law), to consider:

(a) what changes in the matrimonial law administered by the magistrates' courts may be desirable as a result of the coming into operation of the Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970, and

(b) any other changes that may appear to be called for in related legislation in order to avoid the creation of anomalies.

Accordingly in January 1971 the Law Commission set up a small Working Party, presided over by Mr. (now Lord) Justice Scarman, then our chairman, and comprising representatives of the Law Commission and the Home Office, to consider these matters with a view to formulating proposals for any legislation that may prove necessary.

2. The Working Party consisted of:

Chairman:	Sir Leslie Scarman	
Members:	Mr. L.C.B. Gower	Law Commissioner
	Lady Johnston	Law Commission st
	Mr. D. Tolstoy, Q.C.	
	Mr. Homfray Cooper	
	Mr. R.L. Jones	
	Mr. R.W. Mott[1]	Home Office
	Mr. J. Nursaw	
	Mr. H.W. Wollaston[2]	

Mr. C.J. Train (Home Office) acted as secretary until August 1972 when his place was taken by Mr. P.C. Edwards (Home Office).

3. The Law Commission is most grateful to the Working Party and to its hard-working secretaries for preparing the consultative document which we now publish. This Working Paper does not necessarily reflect the views of the Home Secretary or of the Law Commission; it sets out the provisional conclusions of the Working Party on the questions referred to them by the Law Commission. It is now being circulated by the Law Commission with a view to eliciting comment and criticism on those conclusions. Comments and criticism should be sent before the end of March 1974 to:

A. Akbar,
Law Commission,
Conquest House,
37-38 John Street,
Theobalds Road,
London WC1N 2BQ.

(Tel: 01-242 0861, Ex: 50).

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1. Mr. Mott resigned in March 1973 on transfer to other wo
2. Mr. Nursaw resigned in the autumn of 1972 on transfer t other work; he was succeeded by Mr. H.W. Wollaston.

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PART I

INTRODUCTION

THE TERMS OF REFERENCE

1. In the last few years there have been significant reforms in the law relating to divorce. The Divorce Reform Act 1969[1] has introduced as the sole ground of divorce that the marriage has broken down irretrievably. In 1970 the Matrimonial Proceedings and Property Act[2] extended in many ways the powers of the court on divorce, nullity or judicial separation to order financial provision for either spouse and for the children; such provision can include a transfer of property from one spouse to another or to a child. These reforms in the divorce law have had two consequences for the family jurisdiction of the magistrates. The first is that under the Matrimonial Proceedings (Magistrates' Courts) Act 1960[3] the magistrates continue to exercise their powers to award matrimonial and financial relief upon a ground, viz. the commission of a matrimonial offence, which has been superseded in the divorce law by the ground of irretrievable breakdown. The second is that there is now an even wider disparity between the powers of the magistrates exercising their family jurisdiction to make provision for the needs of separated spouses and their children and those of the divorce court.[4]

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1. 1969 c. 55, hereafter referred to as "the 1969 Act".
2. 1970 c. 45, hereafter referred to as "the 1970 Act".
3. 1960 c. 48, hereafter referred to as "the 1960 Act".
4. The expression "divorce court" is not a term of art in matrimonial law, but since 1967 the county courts as well as the High Court have had a jurisdiction in matrimonial matters and we have thought it appropriate to use the expression to refer to the courts which have jurisdiction in divorce, nullity or judicial separation.

2. Should the principle upon which matrimonial relief is given in the divorce court, and the new powers provided by the 1970 Act, be extended to the magistrates' matrimonial jurisdiction? If extending the principle of and the powers in the new legislation as a whole would be inappropriate, should not something be done to bring the family law administered by magistrates more into line with the new law administered in the divorce court? If so, what can be done and upon what principles?

3. After the passage into law of the 1969 and 1970 Acts these questions were discussed in Parliament and the Press, and at the beginning of 1971, upon the invitation of the Home Secretary, who has ministerial responsibility for the law relating to the magistrates' matrimonial jurisdiction, the Law Commission set up a Working Party comprising representatives of the Commission and the Home Office under the Chairmanship of Mr (now Lord) Justice Scarman to undertake a review of the matrimonial law in magistrates' courts. The terms of reference of the Working Party were to consider:

(a) what changes in the matrimonial law administered by magistrates' courts may be desirable as a result of the coming into operation of the Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970, and

(b) any other changes that may appear to be called for in related legislation in order to avoid the creation of anomalies.

4. The Working Party has concluded its preliminary review of the matters within its terms of reference and publishes this Working Paper for the purpose of consultation. In conformity with Law Commission practice, it is circulated for comment and criticism and is not to be treated as representing any concluded views. Its recommendations and propos

are provisional only; no conclusions will be attempted until consultation has been completed.

THE NATURE OF THE TASK

5. Paragraph (a) of our terms of reference requires us to consider the three questions that were formulated in paragraph 2 of our Paper; we are also required by paragraph (b) to address our attention to related legislation, such as the Guardianship of Minors Act 1971[5] and the Affiliation Proceedings Act 1957[6] under which the magistrates can exercise jurisdiction over children in a family setting. Are changes needed in these statutes so as to bring them into line with whatever changes are proposed for the 1960 Act?

6. Two events which have occurred since we began our work have influenced our thinking. In "Separated Spouses"[7] Professor McGregor, Mr Louis Blom-Cooper and Mr Colin Gibson published their study of the magistrates' matrimonial jurisdiction. We have made much use of the evidence collected by them. Their study has provided valuable evidence about the magistrates' matrimonial jurisdiction and, almost for the first time in this field, it has made it possible for views to be formed upon the basis of scientifically collected material rather than upon the basis of opinion, however expert that might be. The second event was the setting up by the Law Commission in August 1971 of a Working Party to consider the jurisdiction of courts which deal with family matters below the level of the High Court. We have thought it prudent to bear in mind the possibility that in the not too distant future there may be introduced a "family court" which deals with all family matters. We are, therefore, attempting to

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5. 1971 c. 3.

6. 1957 c. 55.

7. Separated Spouses: A study of the Matrimonial Jurisdiction of Magistrates' Courts by O. R. McGregor, Louis Blom-Cooper and Colin Gibson, published by Duckworth in 1970.

formulate proposals for a reformed law which, while it could be applied within the context of the present jurisditional framework, would also be suited to a unified system of family courts to which all family problems requiring adjudication would be brought.

THE DEVELOPMENT OF THE MAGISTRATES' MATRIMONIAL JURISDICTION

7. The Matrimonial Causes Act 1857[8] established a secular court to hear and determine matrimonial causes. Named "the Court for Divorce and Matrimonial Causes", it was empowered to dissolve marriages (a power previously exercisable only by Act of Parliament) and to grant judicial separation (a remedy previously available only in the ecclesiastical courts). The remedies provided in the 1857 Act (divorce, judicial separation, nullity and restitution of conjugal rights) dealt with breakdown of marriage but had little or no relevance save in the context of breakdown induced by grievous matrimonial offence, and the Act made no provision, except in one respect, for the exercise of any matrimonial jurisdiction by magistrates. The provision it did make was really directed towards a situation of irretrievable breakdown - the "protection order" which magistrates were empowered to make to protect "any money or property [a deserted wife] may acquire by her lawful industry" or otherwise against the claims of her husband and his creditors.

8. The 1857 Act was of very little value to anyone outside the propertied classes. The great majority of wives whom their husbands abandoned or maltreated had to make do with such relief as they could find in the poor law or the criminal law. The first help to the ill-treated woman was given by section 4 of the Matrimonial Causes Act 1878[9], which brought together the strands of the criminal and the poor law for her

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8. 1857 c. 85.
9. 1878 c. 19.

benefit. It provided that, if a husband was convicted summarily or otherwise of an aggravated assault upon his wife, the court or magistrate before whom he was convicted, if satisfied that the wife's future safety was in peril, should have power to order that she should no longer be bound to cohabit with her husband (such order to have the force and effect in all respects of a decree of judicial separation on the grounds of cruelty). The order might further provide for:-

(i) the husband to pay the wife weekly maintenance, and

(ii) the legal custody of any children under 10 to be given to the wife.

9. The 1878 Act was followed by a wider ranging reform in 1886, when the Married Women (Maintenance in Case of Desertion) Act[10] gave a more direct and economically useful remedy to wives. Under this Act if a married woman could establish that her husband was able to support her and his children but had refused or neglected to do so and had deserted her, a magistrates' court could award her maintenance of up to £2 a week. Powers under the 1878 Act were unaffected. The Summary Jurisdiction (Married Women) Act 1895[11] gave magistrates' courts their general matrimonial jurisdiction. It repealed section 4 of the 1878 Act and the whole of the 1886 Act, replacing their limited provisions by a general code of matrimonial relief available to married women (but not men) in courts of summary jurisdiction. In brief, the grounds upon which a wife could apply to a magistrates' court were that her husband had been convicted of violence to her, that her husband had deserted her, that her husband had been persistently cruel

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10. 1886 c. 52.

11. 1895 c. 39.

to her, or that her husband had wilfully neglected to provide reasonable maintenance for her and her infant children. The magistrates could make a non-cohabitation order, order payment of maintenance of up to £2 a week, and grant the wife custody of a child under the age of 16. The wife's adultery, unless condoned, connived at or conduced to, was a bar to an order in her favour.

10. The 1895 Act was a major advance. While following the 1886 Act in allowing maintenance orders to be made without the court also having to make a non-cohabitation order, it empowered magistrates to order the payment of a weekly sum of money where the husband's only offence was "wilful neglect to provide reasonable maintenance". Thus, it constituted a code of matrimonial relief designed to deal with the situation where matrimonial breakdown had occurred but was not irretrievable, and to provide relief before it became irretrievable. This code remained the basis of the magistrates' law until 1960. The Licensing Act 1902[12] added habitual drunkenness by either spouse as a ground for an order. The Married Women (Maintenance) Act 1920[13] corrected the anomaly that no money could be ordered for the support of a child in the wife's custody by making possible an order for 10s. a week. The Summary Jurisdiction (Separation and Maintenance) Act 1925[14] added to the grounds for an order, that the husband was guilty of persistent cruelty to the children, that he insisted on having sexual intercourse while knowingly suffering from a venereal disease, that he was forcing his wife to engage in prostitution, or that he was a drug addict. The Matrimonial Causes Act 1937[15] not

12. 1902 c. 28.
13. 1920 c. 63.
14. 1925 c. 51.
15. 1937 c. 57.

only added to the grounds for an order that of adultery, but introduced the significant provision that a husband (as well as being able to apply for an order on the grounds of his wife's habitual drunkenness) could apply for an order if his wife committed adultery. The 1960 Act, which we shall be considering in detail, attempted to rationalise and modernise the law in the light of the recommendations of the Morton Commission on Marriage and Divorce[16] and of the Arthian Davies Committee.[17] The major advance was that the Act made relief generally available to husbands as well as wives (though the husband had to prove impairment of earning capacity to obtain a money order) and gave power to make orders providing for the custody and support of children, even when the wife (or husband) failed to prove her (or his) ground of complaint.

11. Over the years Parliament has raised the limits of financial relief that the magistrates can order (there has never been a limit on the powers of the divorce court in this respect). An upper limit of £2 for a wife was fixed by the 1895 Act and of 10s. for a child by the 1920 Act. These limits persisted until 1949, when the Married Women (Maintenance) Act[18] substituted £5 as the wife's maximum weekly maintenance and 30s. as the child's. The 1960 Act raised the limits to £7 10s. a week for the spouse and to £2 10s. for a child. Finally, the Maintenance Orders Act 1968[19], on the recommendation of the Departmental Committee on Statutory Maintenance Limits[20], abolished the upper limit for the maintenance of both spouse and child.

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16. (1956) Cmd. 9678.
17. (1959) Cmnd. 638.
18. 1949 c. 99.
19. 1968 c. 36.
20. (1968) Cmnd. 3587.

12. There have been other developments in this jurisdiction since 1895. Magistrates have acquired a social responsibility for the welfare of spouses and their children, which though implicit in the earlier legislation, they were not given the facilities to meet. The main impetus to the development of the social service role of the magistrates in matrimonial matters came from the recommendations of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction (the Harris Committee),[21] which were given effect in the Summary Procedure (Domestic Proceedings) Act 1937.[22] The association of the probation service with the family jurisdiction of the magistrates was confirmed, thus making available to the courts skilled case workers, social investigators and conciliators. Associated with the formal introduction of the investigative and conciliatory functions of the probation service into the family business of the magistrates were other changes in the nature and procedure of the courts. "Domestic proceedings" are now governed by sections 56-62 of the Magistrates' Courts Act 1952,[23] which, amongst other things, provide that the court shall be composed of not more than three magistrates including, wherever possible, both a man and a woman. The business should be taken separately from the criminal work of the court, the general public is excluded from the court, and only a restricted press report is permitted.

ROLE OF THE MAGISTRATES' COURTS UNDER THE PRESENT LAW

13. The 1960 Act[24] enables the court, on finding a compl. for a matrimonial offence proved, to make a matrimonial orde

21. (1936) Cmd. 5122.

22. 1937 c. 58.

23. 1952 c. 55.

24. For convenience an account of the provisions of the Act is given in Appendix 1.

containing any one or more of the following provisions:-

(a) a provision that either spouse shall no longer be bound to cohabit with the other (which provision while in force has the effect in all respects of a decree of judicial separation);

(b) a provision for the husband to make regular weekly payments to the wife;

(c) a provision for the wife to make regular weekly payments to the husband in circumstances where the husband's earning capacity is impaired through age, illness or disability of mind or body;

(d) a provision for the legal custody of any child of the family who is under the age of 16;

(e) in exceptional circumstances, a provision committing the care of the child to a specified local authority;

(f) in exceptional circumstances, a provision that the child should be under the supervision of a probation officer or of a specified local authority;

(g) a provision for access to any child of the family by either of the parties or by any other person who is the parent of the child; or

(h) a provision for either or both of the parties to make regular weekly payments for the maintenance of any child of the family to certain specified persons.

The court's powers with respect to children may be exercised even though it finds that no matrimonial offence has occurred.

Resumption of cohabitation terminates orders, except with regard to children. The applicant's adultery at any time is a bar to the receipt of maintenance, unless such adultery was condoned, connived at or conduced to.

14. Sections 59 and 60 of the Magistrates' Courts Act 1952 recognise that the court may think it right to consider the possibility of reconciliation. Although the statute does not go so far as to place a duty upon the court, the practice in many courts is to consider the possibility of reconciliation before the issue of a summons, and to adjourn the case if the possibility emerges during the hearing.

15. The magistrates can refuse to make a matrimonial order if they consider that the case would be more conveniently dealt with by the High Court. Moreover, where divorce proceedings have begun in the county court or High Court, a magistrates' court maintenance order that is already in existence may be discharged by the court hearing the divorce proceedings. The jurisdictions are also interlinked for enforcement purposes, since under Part I of the Maintenance Orders Act 1958 a divorce court order can be registered for enforcement in a magistrates' court and *vice versa*. When a divorce court order is registered in a magistrates' court, the magistrates have power to vary that order.

16. Under the Guardianship of Minors Act 1971 (now extended by the Guardianship Act 1973) the custody of a child can be awarded to one of its parents, and, if custody is awarded to the mother, the father can be ordered to pay her maintenance for the child. It is thus possible under this Act for a wife who has herself committed a matrimonial offence to obtain maintenance for the children without the history of the matrimonial breakdown being paraded before the courts.

17. To sum up, the main features of the magistrates' role under the present law are their powers (a) to award to the

parties to a marriage which has broken down to the extent that cohabitation has ceased or, in the opinion of the court, can justifiably cease, relief to one party from having to live with the other, (b) to award maintenance, and (c) to intervene for the welfare of the children who are involved in matrimonial breakdown. The law also recognises that the courts may have a part to play in reconciliation.

THE SOCIAL CHARACTERISTICS OF THOSE WHO USE THE MAGISTRATES' COURTS

18. Since 1959 the number of applications for matrimonial orders has increased from about 24,500 to 28,000 in 1971. The number of orders granted has shown an increase from 13,358 in 1959 to 19,483 in 1971. The number of orders applied for and granted under the Guardianship legislation since the 1960 Act came into force has increased from an annual average of just over 5,000 and about 4,500 respectively to 6,365 and 5,343 respectively in 1971. Research conducted by the Law Research Unit at Bedford College suggests that the people who use the magistrates' courts come to a great extent from the three lowest socio-economic classes, the lowest economic class predominating. Although those who resort to the divorce courts are a representative cross-section of society (the introduction of legal aid for this purpose since 1950 and the increase in its availability in 1961 have brought this about), it seems that the upper and middle classes have not to any great extent had recourse to the magistrates to obtain relief for the breakdown of their marriages before they petition for divorce. It was found that of those with decrees of divorce only about 30 per cent had previously had magistrates' orders. The Bedford College team reported that they found it difficult to estimate what percentage of those who obtain magistrates' orders go on to obtain decrees of divorce, but they put it at about 50 per cent. They found no close correlation between the grounds used for obtaining a matrimonial order in the magistrates' courts and the grounds for obtaining a subsequent divorce.

19. The material in "Separated Spouses" allows the broad conclusions to be drawn that the matrimonial jurisdiction of the magistrates' courts is resorted to by the poorer sections of society for the purpose of obtaining financial and, in some cases, other kinds of relief when their marriages have broken down, but firm inferences cannot be drawn about the permanence of such breakdown. Resort to the magistrates is followed by divorce in about half the cases, but even in those cases the possibility of a subsequent divorce may well not be in the applicant's mind when relief is first applied for from the magistrates.

CONCLUSION

20. This outline of the history and principal features of the magistrates' matrimonial jurisdiction supports the view that it has tended to develop in isolation from the High Court divorce jurisdiction. In practice, there are two distinct systems in operation side by side. The matrimonial jurisdiction of the magistrates is used mainly by the poorer sections of the community, whereas the wealthier and better educated people, if they cannot resolve their difficulties out of court, as many of them do, proceed through the divorce court. The divergent development of the two jurisdictions has encouraged anomaly and inconsistency. It is understandable, therefore, that there should arise pressure for their integration. How to modernise and rationalise the two jurisdictions so that a full range of relief is effectually available to all who need it is the underlying social problem which our provisional proposals are designed to help solve.

21. We see it therefore, as within our terms of reference to define within the overall context of the powers of courts with matrimonial jurisdiction, the role of the magistrates' courts in dealing with the problems that arise on the breakdown of marriage. Accordingly, we propose to consider the principle and objectives of the recent divorce legislation

and against that background to formulate what should, we provisionally suggest, be the principle and objectives of the magistrates' matrimonial law.

PART II

THE PROVISION OF FINANCIAL RELIEF

THE DIVORCE REFORM ACT 1969 AND THE MATRIMONIAL PROCEEDINGS AND PROPERTY ACT 1970

22. The 1969 and 1970 Acts[25] provide relief by way of dissolution of the marriage, and relief of other kinds, including financial relief, to the parties to a marriage which has irretrievably broken down. (The 1969 Act also affords relief by way of a decree of judicial separation. Such a decree does not dissolve the marriage bond, and the court is not concerned with whether or not the marriage has irretrievably broken down, but in practice parties seldom apply for this relief as a temporary remedy; indeed they rarely apply for it at all.[26] We consider that, for present purposes, decrees of divorce and of judicial separation can be regarded as almost always concerned with situations of irretrievable breakdown.) "The objectives of a good divorce law should include (a) support of marriages which have a chance of survival, and (b) a decent burial with a minimum of embarrassment, humiliation and bitterness of those that are indubitably dead".[27] The 1969 Act envisages the possibility that even at this late stage in a marriage's life it may be possible to bring the partners together again, and section 3

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25. For convenience an account of the provisions of these Acts is given in Appendix 1. The 1969 and 1970 Acts have now been consolidated in the Matrimonial Causes Act 1973. This Act is not yet in force, and we have therefore thought it best in this Paper to refer to the provisions of the 1969 and 1970 Acts, which will be more familiar to practitioners.

26. Only 211 petitions were filed in 1971 (Table 10, Civil Judicial Statistics 1971 (Cmnd. 4982)).

27. Law Commission: Law Com. No. 6; (1966) Cmnd. 3123, *Reform of the Grounds of Divorce: the Field of Choice*, para. 120.

of the 1969 Act contains provisions designed to secure that the possibility of reconciliation has at least been considered. If, however, the marriage is over, the Act is framed in such a way as to enable it to be dissolved in a manner which causes as little acrimony and embarrassment as is possible in the nature of things. The objectives underlying the 1970 Act are also clear: to rationalise and modernise the powers of the divorce court to provide financial support for the spouses and children of broken marriages. Where a marriage has irretrievably broken down, the 1970 Act enables arrangements to be made for the maintenance of either party or the children, for the transfer and settlement of the family property and for the custody and education of the children.

23. The 1970 Act also makes available more limited powers to deal with circumstances where a marriage is in difficulties but has not irretrievably broken down. Section 6 enables the court to order financial support for a spouse and children if the applicant can prove wilful neglect to provide reasonable maintenance. This remedy is used little more frequently than judicial separation.[28]

PRINCIPLE AND OBJECTIVES OF THE MAGISTRATES' MATRIMONIAL LAW

24. There is a clear contrast between the magistrates' jurisdiction and that exercised by the divorce court under the 1969 and 1970 Acts. The magistrates' jurisdiction is normally exercised at a stage earlier than irretrievable breakdown and is not concerned with change of status. Indeed the marriage may only temporarily have run into difficulties. There is evidence that many orders made by the magistrates come to an end because the parties are reconciled. The role of the magistrates' court in dealing with those involved in matrimonial breakdown may perhaps be illustrated by comparing

28. There were 244 applications in 1971 (Table 10, Civil Judicial Statistics 1971 (Cmnd. 4982)).

it with a casualty clearing station. All the casualties of marriage can be brought to the magistrates' court. Some are clearly mortal; they should go on to be laid to rest by proceedings in the divorce court; some are serious, being more likely than not to end in final breakdown; some however will respond to local treatment and may well recover completely; others are trivial, requiring no more than sympathetic handling and encouragement. It is the duty of those who work in a casualty clearing station to give attention and interim or substantive treatment to all, to do nothing which might turn a minor case into a major one, and to refrain from attempting to treat those whom they have not the competence or equipment to treat. So too the magistrates in their matrimonial jurisdictions. They must look to the possibility that no more may be needed than sympathy and the opportunity for reconciliation. But they must also have the means of treating the more serious casualties of marriage. Turning away from the language of metaphor, we suggest therefore that the role of the magistrates - the principle and objectives of their matrimonial jurisdiction - should be to enable them to intervene on the application of either party to a marriage:

(i) to deal with family relations during a period of breakdown which is not necessarily permanent or irretrievable

  (a) by relieving the financial need which breakdown can bring to the parties,

  (b) by giving such protection to one or other of the parties as may be necessary, and

  (c) by providing for the welfare and support of the children; and

(ii) to preserve the marriage in existence, where possible.

The substantive law and the procedure adopted should be such as to enable the court to fulfil its second objective where this is possible, and in any case not to exacerbate bitterness or to humiliate either of the parties.

25. Upon the basis of the above formulation of the magistrates' role in assisting those whose marriages are in difficulties, we review in detail in the rest of the Paper the powers it would be appropriate for the courts to have in respect of spouses, and in respect of children, and we propose procedural changes the adoption of which might help the courts to carry out their work.

ORDERS IN RESPECT OF SPOUSES

26. In the following paragraphs we deal with the provisio of financial relief. We take this matter first because we believe that the main reason why people come to the magistra courts when they are in matrimonial difficulty is to obtain an order for maintenance. Thus in practice the court's prim function is to provide financial relief. We discuss later i this Paper the question of whether the magistrates should al be able to provide relief of other kinds.

27. If the law is to accord with the principle and object which we have outlined above, the substantive law and proced in the court must be such that financial relief can be obtai without exacerbating the matrimonial dispute. We also take the view that, in accordance with the summary character of th jurisdiction, financial relief should be cheaply and speedil available, through a simple and readily understandable pro- cedure. There are two elements involved in achieving these objectives, the substantive law and the procedure adopted in the courts. We deal with the substantive law in paragraphs 70 below. Procedural matters are considered in paragraphs 71-116.

28. At present, in order to obtain a matrimonial order in the magistrates' courts the applicant for the order must prove that the respondent has committed a "matrimonial offence".[29] The grounds for an order in section 1(1) of the 1960 Act are, briefly, as follows:-

That the respondent -

(a) has deserted the applicant;

(b) has been guilty of persistent cruelty to the applicant or to an infant child of the applicant or an infant child of the respondent who is a child of the family;

(c) has been found guilty of an assault upon the applicant or of a sexual or indecent assault (or an attempt at such an assault) upon an infant child of the applicant or upon an infant child of the respondent who is a child of the family;

(d) has committed adultery;

(e) has insisted on having intercourse with the applicant while suffering from venereal disease;

(f) is for the time being an habitual drunkard or a drug addict;

(g) being the husband, has compelled his wife to submit to prostitution;

(h) being the husband, has wilfully neglected to provide reasonable maintenance for the wife or any child of the family, or

(i) being the wife, has wilfully neglected to provide reasonable maintenance for the

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29. It is to be noted that this term is not used in the Statutes.

husband or any child of the family while the husband was incapacitated by age, illness, or mental or physical disability.

29. We have considered whether it is acceptable or necessary to retain this long list of matrimonial offences as grounds for making a matrimonial order. By reason of our terms of reference we took as our starting point the reformulated grounds of divorce and judicial separation set out in section 2 and 8 of the 1969 Act and, flowing from these, the grounds for making a maintenance order under the 1970 Act; but we consider that neither of these provisions gives an adequate basis for reform of the magistrates' law. The divorce court exercises its powers to make a maintenance order in respect of a party to a marriage principally on the basis that it has terminated the marriage either by divorce or by judicial separation or by a decree of nullity. But when a matrimonial case comes before the magistrates, the marriage may not yet have irretrievably broken down and may never do so; and even if it has, this is usually incapable of proof at such an early stage. Therefore, none of the circumstances to the proof of whose existence the divorce court must give its attention in hearing a petition for divorce, judicial separation or nullity of marriage, need necessarily exist when magistrates are asked to make an order.

30. It is true that the divorce court's powers to order maintenance are not exclusively confined to situations in which marriage has irretrievably broken down. Section 6 of the 1970 Act enables a wife to apply for an order on the ground that her husband has wilfully neglected to provide reasonable maintenance for her or her children. The divorce court is thus empowered to deal with situations closely analogous to those which confront the magistrates in exercising their matrimonial jurisdiction under the 1960 Act. However, in framing our proposals for reform of the law administered by the magistrates we have not thought it right

to place too much reliance on this provision, despite its apparent relevance to our work. It is clear from their Report on Financial Provision in Matrimonial Proceedings that the Law Commission regarded the concept of wilful neglect to maintain as rather less than satisfactory; and that they recommended a provision embodying this concept mainly as a stop-gap until such time as the whole basis of the duty to maintain could be reformulated in relation both to the divorce court and the magistrates' court.[30] We do not think it is possible, therefore, to use the 1969 or the 1970 Act as a basis for reforming the law administered by the magistrates. Our task, as we see it, is to formulate, albeit at this stage provisionally, proposals designed to ensure that the "first-aid" offered by the magistrates operates consistently with the permanent remedies available in the divorce court when the marriage has irretrievably broken down. The contrast between the two jurisdictions as they exist today is remarkable and has been heavily criticised. The court of last resort (i.e. the divorce court) can give relief without evidence of a matrimonial offence, whereas the court offering first-aid cannot. Is this sensible, when one of the objects of the law is to encourage reconciliation - or, at the very least, settlement of family disputes without rancour in court or bitterness afterwards?

31. In our view, it is not possible to achieve a coherent and sensible relationship between the two jurisdictions without first attempting a statement of the principle that ought to underlie the law relating to the mutual support of spouses and their children. There is a further point. Section 1(1) of the 1960 Act is unsatisfactory not only in principle, for the reasons we have discussed, but also on grounds of practice. Its provisions are unduly complicated and are better covered by a more general reference to unreasonable conduct. We

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30. *Report on Financial Provision in Matrimonial Proceedings* (Law Com. No. 25), para. 15.

conclude, therefore, that a review of the grounds set out in section 1(1) of the 1960 Act is necessary and that, if sense and coherence are to be brought to the matrimonial maintenance law as a whole, it should be preceded by an examination of the policy which ought to underlie the law relating to the obligation of one spouse to maintain the other.

THE OBLIGATION TO MAINTAIN

32. Upon what principles then should the law be based? At common law two of the obligations of marriage are upon the husband to maintain the wife and upon each party to cohabit with the other; there is no obligation at common law upon the wife to maintain the husband. These obligation are in one sense distinguishable. The obligation to cohabit has become a private matter between the parties and is now unenforceable through process of law. But the obligation to maintain has been extended and its enforcement facilitate by statute. The most notable extension is that, for the purposes of the social security legislation, both spouses are treated on a basis of strict equality; each is obliged to maintain the other.[31] This obligation, however, cannot be enforced if the matrimonial conduct of the party who sho have been maintained has been such as to deprive him or her of a right to maintenance under the general matrimonial law.

33. The position with regard to the children of the marr is rather different. For the purposes of the social securi legislation, the obligation of both spouses to maintain eac other extends also to their children under 16. But the gen matrimonial law does not go so far as this. In seeking to formulate the policy which should underlie the law relating

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31. Ministry of Social Security Act 1966, section 22.
32. *National Assistance Board v Wilkinson* [1952] 2 Q.B. 64

to the obligation to maintain, we think it right to state from the outset as a clear general principle, that both parties to a marriage should have an absolute obligation to maintain their dependent children and that that obligation should survive irrespective of the way in which they have behaved towards each other. We return to the subject of orders in respect of children in a later section of this Paper.

34. The 1960 Act, while it does not go so far as the social security legislation, has empowered magistrates in domestic proceedings to order a wife to maintain her husband if he is disabled; a similar provision is to be found in section 6 of the 1970 Act. While these provisions constitute a recognition that a wife has obligations towards her husband in certain circumstances, we suggest that they have fallen behind the current legal and social trends, which are towards giving women equal rights and requiring them to accept equal burdens with men. The statute law (both matrimonial law and social security law) has been moving towards the proposition that the obligation of each spouse to maintain the other is fully reciprocal. We consider, therefore, that the distinction between the formulation of the obligation to maintain in the divorce and social security law and that in the magistrates' court law and in section 6 of the 1970 Act can no longer be maintained. The time has come, we suggest, when the law should recognise the duty of each spouse to support the other, leaving it to the court to determine in particular cases against whom an order should be made and for how much. The Law Commission, when they recommended that section 6 of the 1970 Act should be formulated in much the same terms as section 2(1)(c) of the 1960 Act, were aware that logically there should be no distinction between husband and wife. But they felt they could not go so far without a complete reformulation of mutual obligstions to maintain - a task which went beyond what they were then considering. Nevertheless, the 1970 Act makes explicit that the obligation to maintain arises from the fact that the parties have been married and that

the obligation is mutual. If this is the policy underlying the matrimonial maintenance law on dissolution, when the obligations of marriage have ceased, the same principle shoul certainly apply while the marriage still exists.

THE GROUNDS FOR AN ORDER

(a) FAILURE TO MAINTAIN

35. If the obligation to maintain were to be recognised in the general matrimonial law as fully reciprocal, in what circumstances should magistrates have power to order maintenance and what facts should they take into account in doing so? For the purpose of discussion we tentatively put forward the proposition that the principal ground upon which a court should have power to order maintenance should be failure by one of the parties to the marriage to provide such maintenance for the other party or for any children as is reasonable in all the circumstances. We recognise that such a formulation, which relies upon the concept of "reasonable in all the circumstances", leaves a very wide discretio to the court. But we think this is a good starting point, particularly for the lay magistracy. We deal later (paragraphs 45-55) with the relevance of the parties' conduct to the decision whether or not to make an order, and we propose guidelines (paragraph 56) as to other factors which the court should take into account.

36. Any new legislation affecting the obligations of parties during marriage will have to be expressly drafted to override the common law by making the obligations reciprocal and to amend section 6 of the 1970 Act by introducing full reciprocity and removing the requirement to establish that the failure to maintain was wilful. Our terms of reference require us to avoid the creation of anomalies in related legislation and section 6 is certainly "related legislation". Accordingly, we propose that section 6 of the 1970 Act

should be amended so as to bring it into line with the new provision which we have formulated.

(b) OTHER GROUNDS

37. If failure to provide reasonable maintenance were the principal ground on which magistrates could order maintenance, what additional grounds will be necessary? The existing law can be thought of as providing a remedy for two other basic situations:

(a) that where the parties are living together, the husband is supporting the wife but his conduct is intolerable and she wishes to leave him; and

(b) that where the parties are living apart but the husband is financially supporting the wife.

38. To take situation (a) first, at common law, as we have noted, two of the obligations of marriage are upon the husband to maintain the wife and upon each party to cohabit with the other. It is impossible, in our view, to formulate the policy relating to the enforceability of the obligation to maintain, whilst the marriage subsists, without having regard to the existence of the obligation to cohabit. To what extent then should the obligations to cohabit and maintain be regarded as separable, to what extent are they interlinked? To put the question in more practical terms, should the courts be able to intervene upon the application of either spouse if cohabitation has become intolerable, regardless of whether financial support for the applicant or members of the family has ceased?

39. Section 2(1) of the 1960 Act enables a wife to apply not only for maintenance but for a non-cohabitation order

where the husband has been guilty of persistent cruelty or misconduct in one of the other ways specified in section 1(1). A non-cohabitation order while in force has the same effect as a decree of judicial separation. The making of such an order does not relieve the husband of his obligation to maintain, but does relieve the wife of her obligation to cohabit. We go on to consider in a later section of this Paper the part which a non-cohabitation order should play in any reformulation of the magistrates' matrimonial law, but it will be appropriate at this point to consider whether there is any justification for intervention by the courts in circumstances where the parties are cohabiting but the issue of financial relief does not immediately arise becuase the husband is maintaining the wife. The situation is not uncommon where a wife is compelled by necessity to continue to live with her husband even though his behaviour is such that she should not be expected to do so. He may be violent, dissolute or immoral. Unless the law allows the wife a remedy on some ground other than that her husband is not maintaining her, she will not be able to obtain the court's assistance to relieve her from her predicament by giving her some sort of financial independence. We think it right therefore that there should continue to be available a ground which will enable a wife in this position to escape from her husband and obtain financial relief if she needs it. We suggest this ground should be that the husband has behaved in such a way that the wife cannot reasonably be expected to live with him (i.e. following section 2(1)(b) of the Divorce Reform Act 1969). If such a ground were provided, it would follow that the principal defence available to a husband would be that he has not behaved in such a way. It would not be a complete answer to a wife's claim for maintenance on this ground that he was in fact maintaining her or that he had a home available for her which she was unwilling to share.

40. The question arises whether such a provision should be fully reciprocal. In other words, should a husband whose

wife is violent, dissolute or immoral also be able to apply for an order? We have proposed earlier in this Paper that the time has come when the law should recognise the duty of each spouse to support the other, leaving it to the court to determine in particular cases against whom an order should be made and for how much. It would follow that, if the law were to allow the wife a remedy on some ground other than that her husband is not maintaining her, such a remedy ought also to be available to her husband. In the vast majority of cases, the husband will be the principal wage-earner, and no question will arise of his needing to be maintained by his wife. Clearly, where the husband is able to maintain himself, he will have little to gain by approaching a magistrates' court for an order terminating his obligation to cohabit with his wife. But cases may arise from time to time in which the husband, for one reason or another, is unable to maintain himself. He may be temporarily unemployed or sick; he may be old and infirm; he may suffer from some mental or physical disability. We therefore put forward for discussion the proposition that, in addition to the general maintenance ground we have suggested, it should be open to either party to a marriage (whether the parties are still living together or one of them has been driven to leave) to apply for a maintenance order on the ground that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent.

41. We have considered whether such a general "matrimonial offence" ground, which would replace the specific grounds listed in section 1(1) of the 1960 Act, should always be available to applicants, that is, even if the applicant could also allege that the respondent is not maintaining her. We need in any case to allow an applicant to seek the court's protection against intimidation. It is more doubtful whether other conduct should be capable of being raised as a matter of right. On the one hand, it might be desirable that the

"matrimonial offence" ground should be generally available for two distinct purposes; first, so that an applicant who is contemplating a subsequent divorce would be able to get on record while the evidence is still fresh the matrimonial conduct which would afford the basis of a divorce, and secondly so that in any subsequent proceedings relating to the order, for example if there is a later offer to resume cohabitation, the nature of the conduct which formed the basis for the order is established. It might be considered inadvisable for any party to fail to provide against future matrimonial developments by relying solely on the ground of failure to maintain. But on the other hand, if the "matrimonial offence" ground were always available, this might militate against the new legislation achieving what we take to be one of its main objectives, viz, that it should try to avoid a recital of the history of the marriage before an order can be obtained. Against this, however, it can be said that if the statute were framed in such a way that the "conduct" ground is available to the applicant although she is not being maintained, the applicant would not necessarily have to raise issues of conduct in order to get relief; if the facts are admitted and the case uncontested the respondent is unlikely to raise them himself. The respondent will, of course, raise issues of conduct if they are material whatever the ground and, short of making conduct immaterial, this cannot be avoided. On balance, we think it would be undesirable to try to prevent the applicant who could proceed on the failure to maintain ground from proceeding on the conduct ground in the first instance if he or she wishes to do so. In any case, it seems likely that the need to place on record evidence of matrimonial misconduct will become less important under the new divorce legislation.

42. We now turn to situation (b). If the parties have ceased to cohabit, it will often happen that a deserting husband will continue to maintain his wife. If he does not, then the failure to maintain ground is available to the wife

but if he does, on what ground could intervention by the courts be justified? Should the courts be able to intervene solely on the ground that the respondent refuses to live with the applicant, or, put in terms of the existing law, should desertion continue to be a ground for an order? One ground for intervention, we suggest, might be as a protection against the future. The wife in these circumstances might be thought to be justified in wanting an order as security against her husband's future failure to maintain her. We wonder, however, whether the effect of enabling the courts to intervene in this situation might not be simply to encourage unnecessary litigation. If there is genuine need for relief, for example because maintenance (though substantial) is irregularly paid, the court should be able to intervene on the ground that the husband is not maintaining, i.e. not providing reasonable maintenance. The same arguments apply *a fortiori* where there are any children of the marriage. Another possible justification for the court's intervention is that desertion can be difficult to prove and, as it remains a ground for establishing irretrievable breakdown and thus obtaining a divorce, it should be possible for the applicant to prove desertion as soon as it begins. But this alone may not be an adequate ground for an exercise of the magistrates' matrimonial law. The primary purpose of the existing desertion ground provided by section 1 of the 1960 Act is not to provide evidence for a later divorce, but to enable a deserted wife to obtain a maintenance order against her husband either to cover her immediate needs or as a safeguard for the future.

43. Nevertheless, our own inclination would be to preserve the existing position. We therefore provisionally propose that there should be a third ground on which it should be possible to apply to the court for an order: namely, that the respondent is in desertion. We should welcome views on this question.

44. It may be convenient at this point to summarise the arguments so far. What we have proposed on the basis of the principles formulated in this Paper is that either party to a marriage should be able to apply to a magistrates' court for an order on one or more of the following grounds:

(a) that the respondent has failed to provide such maintenance for the applicant or for any children as is reasonable in all the circumstances; or

(b) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent; or

(c) that the respondent is in desertion.

THE ROLE OF CONDUCT

45. The grounds which we have formulated give rise to a number of difficult questions. The principal question is: whether and, if so, to what extent the courts should have regard, in ordering maintenance, to the conduct (hence the degree of responsibility for the breakdown) of the respective parties to the marriage? (We have already put forward the view that conduct should never affect the maintenance ordered for children.) There can be no absolute answer to a question like this; times change and, with them, the moral attitudes which the public at large bring to marital misconduct. Behaviour which 50 years ago might have been greeted with severe disapprobation may nowadays pass with scarcely a raised eyebrow. Even the 13 years since the 1960 Act was passed have, we think, seen a shift in the public attitude towards misconduct within marriage. The effect of section 2(3) of the 1960 Act (itself a restatement of the previous law) was to make adultery by the wife an absolute bar to financial relief if committed during the subsistence of the marriage

and not condoned, connived at or conduced to by the husband. It seems doubtful to us whether it is any longer acceptable to public opinion that the commission by the wife of a single act of adultery should be regarded as sufficient to disqualify her automatically from all financial relief. (Section 6 of the 1970 Act, though drafted in a very different way from the 1960 Act provision, has much the same effect in practice because of the body of case law attaching to the concept of wilful neglect to maintain. If a wife commits adultery her husband's obligation to maintain her ceases unless the adultery was condoned, connived at or conduced to; and hence there cannot thereafter be any wilful neglect to maintain her.) We can see no justification nowadays for a court's being bound to refuse to make a maintenance order in favour of an otherwise deserving wife because she has committed a single act of adultery; the more so since adultery is not a bar to an award of maintenance in divorce proceedings. We therefore suggest that in any reformulation of the magistrates' matrimonial law, adultery should not of itself be regarded as an absolute bar to financial relief, but should be treated in the same way as other forms of misconduct. So too with section 6 of the 1970 Act.

46. We therefore turn to the wider and more difficult questions of the effect of conduct. These can perhaps best be formulated in terms of two general questions. To what extent should the magistrates have regard to the conduct of the parties in determining whether or not to make a maintenance order? And, if they do decide to make an order, to what extent should they have regard to conduct in determining what the amount of the order should be? So far as the divorce jurisdiction is concerned, these questions have recently been the subject of detailed examination in the Court of Appeal. In *Wachtel v Wachtel*[33] the Court of Appeal was asked to determine, for the first time, after full argument, the principles that should be applied in the Family Division when granting ancillary relief pursuant to the powers conferred by the 1970

33. [1973] Fam. 72.

Act following dissolution of a marriage. Lord Denning M.R., giving judgment, said:[34]

> "It has been suggested that there should be a "discount" or "reduction" in what the wife is to receive because of her supposed misconduct, guilt or blame (whatever word is used). We cannot accept this argument. In the vast majority of cases it is repugnant to the principles underlying the new legislation, and in particular the Act of 1969. There will be many cases in which a wife (though once considered guilty or blameworthy) will have cared for the home and looked after the family for very many years. Is she to be deprived of the benefit otherwise to be accorded to her by section 5(1)(f) because she may share responsibility for the breakdown with her husband? There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words....."both obvious and gross", so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life... Criminal justice often requires the imposition of financial and indeed custodial penalties. But in the financial adjustments consequent upon the dissolution of a marriage which has irretrievably broken down, the imposition of financial penalties ought seldom to find a place."

These remarks are of course binding in relation to the jurisdiction exercised by the divorce court on dissolution of a marriage. They are not, however, applicable to the existing jurisdiction of the magistrates in matrimonial matters as the law now stands. Whereas the divorce law no longer is based on the doctrine of the matrimonial offence, this doctrine still lies at the heart of the 1960 Act. The award

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34. At p. 90.

of maintenance by the magistrates, except in the case of children, continues to depend upon proof of a matrimonial offence.

47. We have proposed in this Paper that the primary objective of the magistrates in exercising their matrimonial jurisdiction should be to deal with family relations during a period of breakdown which is not necessarily permanent or irretrievable by relieving need, by giving protection and by providing for the welfare and support of the children (paragraph 24). And we have suggested that, in place of the long list of matrimonial offences provided in section 1(1) of the 1960 Act, there should be three simple grounds on which the magistrates should be able to make an order: failure to provide reasonable maintenance, unreasonable behaviour on the part of the respondent and the respondent's desertion (paragraphs 35-44). We go on to consider now whether, and if so how, the principles laid down by Lord Denning in *Wachtel v Wachtel* can be made to operate in the matrimonial jurisdiction exercised by magistrates under the reformulated law which we are proposing.

CONDUCT IN THE MAGISTRATES' JURISDICTION

48. There seem to us to be at least four possible approaches to the problem of conduct in the magistrates' jurisdiction. They may be set out as follows:-

(i) the obligation to maintain should be regarded as absolute and reciprocal and, thus, matrimonial conduct should not be taken into account in determining liability or quantum;

(ii) conduct should be relevant in every case as regards liability, but should not be taken into account in determining the amount of the order;

(iii) conduct should be relevant, both as regards liability and quantum; and

(iv) conduct should be relevant in every case, both as regards liability and quantum, but if the court decides to make an order, it should not reduce the amount it would have ordered below a sum sufficient to provide the applicant with the basic necessities of life.

We go on to discuss each of these possible approaches in turn.

49. Under the first possible approach marriage would be regarded as placing an absolute obligation on each spouse to maintain the other, irrespective of the other's conduct; in other words, an entitlement to a maintenance order would be established solely by the fact of marriage, the needs of the one party and the ability of the other to maintain. The argument for adopting such a policy might run as follows. Husband and wife take each other for better or for worse; if the worse comes to the worst, and the marriage runs into difficulty, a husband should not be able to release himself from his liability to maintain unless the marriage has been dissolved by a court order. Such a principle has the obvious advantage that it would remove the discussion of conduct wholly from the magistrates. But we doubt whether it would be acceptable to public opinion to require a husband to maintain a wife who had abandoned him for a penniless lover without allowing the husband to oppose the enforcement of the obligation against him on the ground of the wife's conduct.

50. The second possible approach would be to allow conduct to be a ground for refusing an order but to provide that, once the court had decided that there was an obligation upon the respondent to pay maintenance to the applicant, the

applicant's matrimonial conduct should not be taken into account for the purpose of assessing the amount of maintenance that was due. Such an approach would in general give effect to the principles enunciated in *Wachtel v Wachtel*, in that there would be no reduction in the amount of the order provided that the wife's conduct had not been so "obvious and gross" as to disentitle her to maintenance. There is some theoretical attraction about this approach. While cohabitation continues, a husband does not review his wife's conduct each week to see how much housekeeping money she deserves - the obligation to maintain is to maintain fully. If the court, on being asked to intervene, considers that the obligation to maintain has not been ended by the applicant's conduct, the same principle should apply so that the applicant should be maintained fully. An objection to this proposal, however, is that the wife whose conduct, while not being primarily responsible for the disruption of the marriage, has been a contributory factor, would get as much maintenance as a wife whose conduct has been impeccable. This, we believe, would be likely to offend the sense of justice of magistrates and litigants alike, with the result that the magistrates might be tempted to find other reasons for depressing the amount of the order and the respondent might be less likely to keep up the payments. On the other hand, there is an argument on the ground of social policy that, so long as a marriage is still in being, the wife who has shown she is entitled to a maintenance order (that is, her conduct has not been such as to break her husband's obligation to maintain her) should not be awarded less money than she needs.

51. The third possible approach to the question of conduct would be to provide that the court should have regard to the matrimonial conduct of the applicant both in deciding whether to order maintenance, and if so for what amount. A solution on these lines would not be inconsistent with the divorce law, which explicitly provides in section 5(1) of the 1970 Act that, in exercising its powers in relation to

a party to the marriage, the court should have regard to conduct; though, in so far as it left the magistrates free to reduce the amount which they would otherwise have ordered by reason of any conduct which was not obvious and gross, it might be thought to be at variance with the principles enunciated in *Wachtel v Wachtel*. Moreover, such an approach would also reflect the policy underlying the existing magistrates' law, since the 1960 Act provides that the magistrates shall make such order as is reasonable in all the circumstances of the case, and it has been held that the conduct of the parties must be taken into account in fixing the amount of the order. However, we are suggesting as one of the main objectives of any reformulation of the magistrates' matrimonial law the avoidance so far as possible of the rehearsal of matrimonial conduct in open court. This objective might seem to be in danger if it were necessary whenever allegations were made about a party's conduct to consider the marital history before deciding whether an order should be made and, if so, what the amount of the order should be. The answer may be thought to be that it is right and proper, whenever allegations are made, for the court to give such weight as it thinks reasonable to the parties' conduct both in determining liability and quantum. But this argument becomes more difficult to sustain now that, following the judgment in *Wachtel v Wachtel*, the divorce court is precluded, except in cases where misconduct is obvious and gross, from reducing the amount of maintenance which it would otherwise have ordered by reason of the applicant's conduct. If it is right that when a marriage is over and the time comes, as it were, to balance the matrimonial account on the basis of all elements in the marriage, the divorce court should not reduce the amount of maintenance that the wife is to receive because of her supposed misconduct (assuming that her misconduct has not been obvious and gross), then *a fortiori* it is right that while the marriage subsists the magistrates should concern themselves only with whether or not, in the light of the parties' conduct, there is an obligation to provide for maintenance and should not

reduce the amount which they would otherwise order by reason of that conduct.

52. We have considered whether it is possible to avoid this difficulty by devising a formula which required the magistrates to have regard to conduct in assessing the amount of the order only if the respondent's means are such as to enable him to pay an amount above the wife's needs. One way of achieving this would be to set a definite amount (e.g. current supplementary benefits level) beyond which the magistrates would not be able to award maintenance. Anyone wishing to get maintenance beyond this amount would have to proceed in the divorce court under section 6 of the 1970 Act. But we rejected this idea because it would reverse the effect of the Maintenance Orders Act 1968 which removed the statutory maintenance limits, and would compel parties to select their tribunal according to their means.

53. As an alternative, we have therefore considered a fourth possible approach to the question of conduct: namely, that if the court decides to make an order, the court should not reduce the amount it would have ordered to be paid to the applicant by reason of her conduct below such an amount as it considers the applicant requires in order to meet the basic necessities of life. In other words, conduct would be considered only when the means of the parties were such that an order could be made taking the applicant above subsistence level. If this solution commended itself to the public at large, we suggest that for the sake of convenience subsistence level might be defined as the amount of income at which entitlement to supplementary benefits would cease. We think there would be some advantage in relating the cut-off point to the State scheme, since information about supplementary benefit rates can readily be ascertained at local level and since without some such yardstick, irrelevant though it may be to liability as between husband and wife, the courts might experience real difficulty in determining what amount, having

regard to local circumstances and fluctuations in the cost of living, would be sufficient to provide the basic necessities of life. But though a solution along these lines might have practical and theoretical merit, we think it right to put the arguments of principle which might be raised against it. If conduct were relevant only in circumstances where a husband could afford to pay his wife an amount more than she required in order to meet the basic necessities of life, the practical effect would be that a wealthy husband's liability to maintain could be substantially reduced by his wife's conduct, whereas a poorer man would be required to pay all he could, however badly his wife had behaved.

54. In practice, because of the financial circumstances of the parties, the magistrates are often unable to make an order on behalf of a spouse alone that is sufficient to meet her needs, and in most cases the order will include children for whom the applicant will receive maintenance irrespective of her conduct. Perhaps the most important objection to this approach is the fetter which it places on the discretion of magistrates to award what they think is just and reasonable in the particular circumstances of the parties before them.

55. We are aware that the four possible approaches we have discussed constitute a by no means comprehensive treatment of the question of conduct; other approaches may occur to those reading this Paper. We make no recommendations in favour of one rather than another and should welcome views.

FACTORS OTHER THAN CONDUCT

56. We have discussed at some length the part which matrimonial conduct should play in the making of a maintenance order. It now remains to consider what other factors should be taken into account by the court in determining whether or not to make an order and, if so, for what amount. It may be useful, for this purpose, to refer to section 5 of the 1970

Act, which sets out the matters to which the divorce court should have regard in making a maintenance order on divorce. Magistrates' courts have no such similar statutory guidance at present, but the judgments of the Divisional Court constitute a body of settled case law from which guidelines can be extracted for the use of magistrates. However, it has been pointed out most forcefully and persuasively by Mr Brian Harris[35] that this is not a satisfactory arrangement. He questions whether "the existence of a large corpus of rules about the determination of maintenance in the form of case law is really the most suitable way in which to enshrine principles which have to be administered by a lay tribunal, however capably advised", and advocates the formulation on the lines of section 5(1) of the 1970 Act, in so far as it is applicable, of the principles on which the level of maintenance is fixed by magistrates. We agree with this view and therefore propose that any new legislation should specify the factors to which magistrates should have regard in making maintenance orders in the same way as the 1970 Act does. The principles contained in the 1970 Act, because they deal with the termination of marriage, are not wholly appropriate; but we suggest that the court should have regard to the following:

(a) the income, earning capacity, property and other financial resources of each of the parties; and

(b) the financial needs, obligations and responsibilities of each of the parties.

We should particularly welcome views on whether these guidelines are sufficiently comprehensive.

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35. 'A Wife's Worth', 136 *Justice of the Peace* (1972) pp.3,22.

THE DEFENCES AGAINST AN ORDER

57. We see no need to formulate specific defences against applications for an order on any of the three grounds we have proposed. If the reformulated magistrates' law is to contain provisions as to the extent to which the courts may have regard to conduct and as to other factors they may take into account, it will be for the respondent who wishes to contest an application to do so, within the statutory guidelines, by rebutting the facts alleged by the applicant. If the application is on the third ground (desertion), the respondent will of course be able to raise the same defences as are available under the existing law. We think it appropriate to rely on the settled meaning of the existing law on desertion, without attempting to codify it.

THE NATURE OF THE ORDERS TO BE MADE AVAILABLE

58. At present, as we have seen, the powers of a magistrates' court to award financial relief are very much narrower than those of the High Court. Some of the powers exercisable by the divorce court are in our view unsuitable for lay magistrates. We need not consider the complexities that may be involved in an order for the transfer of property or the making or variation of a settlement (section 4 of the 1970 Act), since they are suitable for exercise only on the termination of a marriage, not when the marriage still exists. They are not available in the case of an order under section 2 of the 1970 Act. We also consider that it would be inappropriate for the magistrates to be given power to make orders for secured periodical payments (section 2(1)(b) of the 1970 Act). There is no suitable organisation in the magistrates' courts for seeing that security is provided, as there is in the divorce court, for example, on an application under section 6 of the 1970 Act. This consideration has weighed with us more than the argument that most people who use the magistrates' courts have not sufficient means to provide

security; we wish to make it possible for a more general use of the magistrates' courts by all classes of the community.

59. On the other hand, we propose that magistrates should be given power to order the payment of a lump sum in addition to any periodical payments ordered. There are a number of circumstances in which such a power might be useful. If the husband has left home and is not maintaining his wife and children, he may have left behind him an outstanding hire purchase debt or a gas or electricity bill. Similarly, if his behaviour has made it intolerable for his wife to continue living with him, she may have a number of minor expenses to meet in establishing a new home for herself. We think it consistent with the essentially summary character of matrimonial proceedings in magistrates' courts that there should be power to order the payment of a lump sum in these circumstances, though we think that such a power should be available to the court only on the occasion when the original order is made. We have considered various ways in which the power might be limited. One way would be to link the amount of the lump sum with that of the order by stipulating that the courts should have power to award sums not exceeding, say, ten times the amount of the weekly order. But this might not automatically produce the right result in cases where the court had reduced the amount of maintenance ordered by reason of the applicant's conduct. On balance we think the sensible course would be to stipulate an upper limit in monetary terms which could be varied from time to time by rules of court. The amount should not be so low as to force applicants who might otherwise seek relief in the magistrates' court to go to the divorce court. We invite suggestions as to the appropriate limit.

60. One difficulty about allowing magistrates to award lump sums arises from the fact that the enforcement powers of the magistrates are more appropriate for collecting

periodical payments out of income than recovering lump sum payments out of capital. We do not think that this is an insuperable objection to giving magistrates such a power if it is thought to be desirable on its merits. It would not be difficult to provide effective machinery for enforcement by treating the lump sum in the same way as arrears under a maintenance order. Moreover, there would be power to dispense with immediate payment, either by allowing time for payment, or by ordering payment by instalments, under section 63 of the Magistrates' Courts Act 1952.

61. As regards the power to order periodical payments, we consider that the magistrates' powers, which at present are limited to ordering the payment of weekly sums, should be widened. Now that people are increasingly being paid monthly, it does not seem desirable any longer to restrict magistrates' courts in this way. We therefore propose that they should be given a power, similar to that conferred on the divorce court by section 2(1) of the 1970 Act, to order periodical payments at such intervals as they consider appropriate. We do not think that this provision will require any substantial alteration in the enforcement legislation. It might also have the incidental advantage of reducing the work of the collecting officer.

62. As has been noted above, we shall describe the procedure which we are proposing for the making of orders later in the Working Paper after dealing with all types of order. We think it appropriate before considering orders for matrimonial relief to deal with the subsequent history of financial orders in favour of spouses. The three substantive issues discussed relate to variation, cessation and revocation of orders.

VARIATION AND REVOCATION OF THE ORDER

63. We see no reason to change the existing statutory provisions regarding variation of an order in favour of a spouse; these are contained in section 8 of the 1960 Act and section 53 of the Magistrates' Courts Act 1952. These provisions give the court a complete discretion as to the factors which it should take into account in varying an order. We have no wish to deprive the courts of their discretion but (on the assumption that they will continue to be required to have regard to the conduct of the parties in fixing the amount of the order) we consider that it would be desirable for any court which later has to review the amount of the order to have available some indication whether the orginal court reduced the amount of the order on account of the applicant's conduct. We have therefore considered whether a procedure could be devised which would minimise the possibility of injustice being done. We propose in paragraphs 105-106 a means whereby subsequent courts may have some indication of the factors which the original court took into account in making the order.

64. There are two circumstances in which an order made under the 1960 Act automatically ceases to have effect. By virtue of section 7(4) of the 1960 Act (inserted by section 30 of the 1970 Act) any provision of a matrimonial order made under the 1960 Act which requires money to be paid to a spouse automatically ceases to have effect if that spouse is subsequently divorced and remarries. We see no reason to change this provision.

65. The second circumstance in which an order ceases to have effect is where cohabitation is continued or resumed. Under section 7(1) of the 1960 Act, where a matrimonial order is made while the spouses are cohabiting the order ceases to have effect if they continue to cohabit for 3 months from the date of the making of the order (with the exception of

certain provisions relating to the children), and by virtue of section 7(2) resumption of cohabitation after the making of a matrimonial order causes it immediately to cease to have effect (with the same exceptions); resumption may be for any period , e.g. of only a week. Section 8(2) of the 1960 Act also provides that a matrimonial order may be revoked on application where it is proved that the spouses have resumed cohabitation. We do not consider that the overlap of sections 7(2) and 8(2) is altogether satisfactory, since if the order automatically ceases to have effect it seems to be unnecessary to have to take proceedings to revoke it. The provision of section 8(2) does, however, ensure that the court is made aware of the cessation of the order because of the resumption of cohabitation. It can happen that where the parties resume cohabitation this fact does not come to the attention of the collecting officer for some time and the date of resumption may be open to question. This can be of importance in regard to later attempts to enforce arrears under the order. It may be that the provision of section 8(2) should be retained for this reason, or for the purpose of establishing the fact of resumption of cohabitation if the parties subsequently again cease to cohabit and a dispute arises as to whether the order continues in force. But on balance we are of the opinion that if the order lapses automatically on resumption of cohabitation the court's power to revoke it under section 8(2) may be unnecessary. Furthermore we are inclined to the view that the provision that the order lapses automatically on resumption of cohabitation should be modified. We propose that there should be automatic cessation of the order only if there has been cohabitation for 6 months after the order whether the cohabitation is continued or resumed. The advantage of this is that it will enable a wife to seek reconciliation without the fear of losing her order and of having to take fresh proceedings for an order if she finds that she is unable to make a success of the reconciliation.

66. The point discussed at the end of the last paragraph raises the question of whether there should be an enforceable "housekeeping" order. Section 7(1) of the 1960 Act provides that an order made while the parties are cohabiting (as well as ceasing to have effect after 3 months' continued cohabitation) shall be unenforceable whilst cohabitation continues, but there is no similar restriction on orders made by the divorce court under section 6 of the 1970 Act. Should, therefore, the magistrates' law be altered to make their orders enforceable during cohabitation? This issue was very fully considered by the Morton Commission[36] and was also raised during the passage of what is now the Matrimonial Proceedings (Magistrates' Courts) Act 1960. The arguments on the one side are that if a wife's only complaint against her husband is that he is not maintaining her, she should be able to obtain an order enforceable notwithstanding that she and her husband are still living together; and that her inability to do so under the existing magistrates' law positively encourages the breaking-up of the home. On the other hand, it can be argued that the existence of an effective order could only further exacerbate relations which were already strained, to the point where the final breakdown of the marriage would be inevitable. The view of the Morton Commission was that orders obtained on the ground of wilful neglect to provide reasonable maintenance should be enforceable while the parties are cohabiting. They argued as follows:

> "If relations between husband and wife are already seriously strained, we think it unlikely that the fact that the wife has obtained a court order which is enforceable will make matters any worse. But where the situation has not gone so far we believe that in some cases at least there is reasonable hope that the making of an order may bring the husband to his senses. Moreover,

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36. *Report of the Royal Commission on Marriage and Divorce:* (1956) Cmd. 9678, paras. 1042-1050.

> the very fact that the court has power to make such an order may in itself have a salutary effect on those husbands who are apt to be careless of their financial responsibility for their families."

We are inclined to share the views expressed by the Morton Commission and we think there might be advantage if an order made on the ground of failure to provide reasonable maintenance were enforceable for the period of 6 months before it ceased to have effect. But we make no firm proposals and should welcome views on this question.

67. As regards revocation, we propose that the courts should be given a complete discretion as in the case of variation. We have already suggested that resumption of cohabitation should not be an automatic ground for revocation unless the cohabitation continues for 6 months. We also consider that if the applicant's adultery is not to be a bar to her obtaining an order for maintenance in the first instance, it should not be retained as a bar to her continuing to receive maintenance because of adultery subsequent to the making of the order. But we suggest that in exercising its powers to vary the court should have regard to all the circumstances including any change in any of the matters to which the court was required to have regard when making the order (cf. section 9(7) of the 1970 Act). This would enable the court to take account of a wife's adultery if it so wished.

PART III

RELIEF OF OTHER KINDS AND PROCEDURAL MATTERS

THE NON-COHABITATION ORDER

68. The magistrates' courts can include in a matrimonial order a provision that the applicant be no longer bound to

cohabit with the defendant. This provision while in force has the effect in all respects (except succession on intestacy[37]) of a decree of judicial separation (section 2(1)(a) of the 1960 Act). This provision originated in the 1878 Act, which was passed explicitly to protect the wife from a violent husband. Gradually the circumstances in which a non-cohabitation order should be made have been limited by decisions of the Divisional Court; and broadly speaking the present rule is that a non-cohabitation provision may be included in an order only where the court is satisfied that the safety of the applicant is in danger. It follows from this that it is mostly where orders are made on the ground of persistent cruelty that the court may be inclined to make a non-cohabitation order. The Divisional Court has held that the decision to insert the provision must be expressly considered by the justices, and that the provision should not be added as a matter of course.[38] It was generally thought that such provisions were included in matrimonial orders only in a small minority of cases and then only in accordance with the guidelines laid down by the Divisional Court. But the Bedford College Law Research Unit[39] produced evidence that (whether inadvertently or not) non-cohabitation provisions are included in matrimonial orders in a substantial number of cases and by no means always in accordance with the guidelines laid down by the Divisional Court.

69. We have considered whether the magistrates' power to insert the non-cohabitation provision in an order should be removed. We do not think that the fact that the magistrates may at present be wrongly exercising their discretion is itself a ground for removing that discretion. The real

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37. See section 40, 1970 Act.

38. See *Corton v Corton* [1965] P. 1; *Jolliffe v Jolliffe* [1965] P. 6.

39. "Separated Spouses", pp. 59-66.

question is whether it continues to be necessary for magistrates to have the power to make an order other than a purely financial one when they are asked to intervene in a marriage that has run into difficulties. As was noted above, the order owes its origin to the need to protect a wife from a violent husband, and it cannot be said that there is now no need to have a power to restrain one spouse from molesting the other. The existence of an order of this type may be of psychological value to a wife who considers that it gives her some measure of protection from her husband. Yet, if there is a need for one spouse to be protected from the other, the non-cohabitation order, as at present framed, is not an effective way of providing such protection. Unlike the injunction which can be granted by the divorce court, it is simply a declaration and is not enforceable. Furthermore it brings an end to desertion, which has caused difficulties for a wife who subsequently attempts to obtain a divorce in reliance on a period of desertion.

70. We are not at present persuaded that the case has been made for removing from the magistrates the power to make this type of order, but we think that the order could be more effective if differently framed. It has been suggested that the magistrates should be able to rely upon their powers to bind the husband over to keep the peace, but this takes matrimonial matters into the ambit of the criminal law; we consider that any power that the magistrates have should be exercised in a context where they are able to call upon counselling services. We suggest for consideration that a new type of remedy in place of the non-cohabitation provision could be made available in the form of a "non-molestation" order. This should be made only where the court considers that the wife needs protection from harm or harassment by the respondent. It should be possible to order non-molestation with or without conditions, as the magistrates in their discretion might decide. If no conditions were attached, the order would

protect the wife from physical attacks or threats. If it were thought necessary to relieve her from the duty of cohabitation, a condition to that effect could be attached. We should particularly welcome views as to whether magistrates should be empowered to attach a condition preventing the husband from entering the matrimonial home. This would be a considerable extension of the powers which have hitherto been entrusted to magistrates. As we have said, we think that it would be inappropriate for this order to be obtained in criminal proceedings, and that it should be obtained in proceedings where counselling services were available. The order should be framed in such a way as to make it enforceable under section 54 of the Magistrates' Courts Act 1952, which enables the magistrates by monetary sanction or by committal to custody to enforce an order other than for the payment of money.[40] We consider that this could provide protection to the wife who was in fear of her husband and an adequate substitute for the existing provision.

PROCEDURAL AND RELATED MATTERS

71. We have formulated our proposals for the substantive law to be applied by the magistrates in adjudicating upon disputes between spouses on the basis of what we consider should be the principle and objectives of this aspect of their jurisdiction. As we said above, the objectives which we propose are to be achieved not only by modifying the substantive law but also by adapting the court procedures under which the law is put into effect. We have expressed the view that in accordance with the summary character of the jurisdiction the relief applied for should be cheaply and speedily available through a simple and readily understandable procedure, and one which is formulated in a way which does not necessitate in every case the applicant

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40. We discuss this provision in more detail in paragraph 132 below.

having to recite the history of the marriage. We realise and acknowledge that in some cases it will not be possible for the applicant spouse to obtain relief without relying upon the conduct of the other spouse as a ground for maintenance, and that it must always be open to the respondent to allege that the conduct of the applicant relieves him of his obligation to maintain. But we consider that the changes in the substantive law which we have suggested will be likely to produce in the magistrates' courts the sort of atmosphere in which family matters ought to be settled. To supplement these changes, we discuss in the following paragraphs some modifications in and additions to the procedure in matrimonial cases which we believe could enable the magistrates more effectively to achieve the objectives of their matrimonial jurisdiction.

72. Our main proposals are to enable the courts to make what we refer to as a consent order, to extend their powers to make interim orders for maintenance, to assist them to a more accurate assessment of means by use of a means questionnaire, and to ensure that reconciliation services are available from the beginning of the proceedings.

THE CONSENT ORDER

73. It could, we believe, be of assistance to many couple if when their marriage has temporarily broken down they were able to obtain the assistance of the courts in regulating the financial arrangements between themselves without having to parade before the court the whole history of their marriage. It is of course possible in practice for the courts at present to make what is virtually an order by consent in spite of the fact that the applicant must establish that a matrimonial offence has been committed and that any payments ordered to be made must be of such an amount as the court considers reasonable in all the circumstances of the case. But at present there is imposed upon the applicant the duty of proof and

upon the court the duty of enquiry into means and other relevant factors. We have considered whether it may be possible to remove some or all of these duties in certain cases, where the couple are in agreement about the amount of maintenance and wish to have this agreement given legal force as a maintenance order, thus providing security for the wife and certainty for the husband.

74. We are attracted by the principle of the consent order, and we see no reason why in appropriate circumstances such an order should not be made. But we think it right to draw attention to the difficulties which arise. The order will be a judicial act, enforceable ultimately by the sanction of imprisonment, and it may run for a long time. It seems essential, therefore, that the tribunal which considers the application should, before making the order, be judicially satisfied that both parties truly consent and appreciate the legal consequences of the order. We accordingly suggest that a consent order should not be made except by a court - though it might be considered whether such a court might consist of a single magistrate. We think it preferable that both parties should attend the court in every case in order to express their agreement to the order, but we recognise that cases may arise in which the one who is to make the payments, normally the husband, is unable, for one reason or another, to do so. We therefore suggest that the court should be given discretion, exceptionally, to proceed in his absence if the wife can produce written evidence of his agreement to the court together with a statement of his means. If the husband is not present in court, we think it necessary that there should be provision enabling him to challenge the order within, say, 14 days from the date of its service or such longer period as the court may direct. Within that period it would be open to him to apply for the order to be set aside on the ground that it was made without true consent; appeal would lie to the Divisional Court from the rejection of the application.

75. We do not think it desirable to enable the courts to convert a written agreement into an enforceable order. It is preferable in our view to have from the first an order which the court could itself have made in defended proceedings and in the form in which it would have made it.

76. We suggest that the court should have power subsequently by order to vary or revoke a consent order on the application of one party and with the consent of the other. But if consent is not forthcoming, we suggest that there should be power to vary or revoke the order only if some change in circumstances is adduced. The court should not have power to reopen the case on its merits.

77. We have considered whether the court should have discretion to refuse to make a consent order. On the one hand, it can be said that the whole purpose of the consent procedure is to give the applicant an enforceable order where there is consent without the need for litigation. Provided that the original consent does not preclude either party from applying subsequently for a variation or revocation both parties' interests will be safeguarded. On the other hand, it may be thought wrong in principle to require a court to make an enforceable order without giving it the opportunity of refusing to act if it is doubtful of the merits of the case. We are disposed to attach weight to the second argument, and we suggest that the court should have discretion to refuse to make a consent order if it considers that such an order would not be in the best interests of the parties and their children. The court may consider that the amount of the order to which the parties have consented is unrealistically high or low, bearing in mind their financial circumstances. The court may consider that one of the parties, in giving consent to an order, is cherishing false hopes about the possibility of reconciliation. It could be argued that there is danger that the consent order will be

used between conniving spouses so that the burden of responsibility for supporting the applicant and the children is placed upon the State by making an agreement that the respondent should provide her with maintenance far below her needs. In practice, the way in which section 22 of the Ministry of Social Security Act 1966 is framed seems to us to preclude this latter sort of arrangement, since it would be possible for the Supplementary Benefits Commission to proceed for an order under that Act if it were of the opinion that the respondent was not fulfilling his responsibilities to his family. But even so, it would be preferable to avoid creation of a conflict of this kind by giving the court a discretion.

78. We consider that the consent procedure should apply to orders for the maintenance of spouses and children, although we think that it will only be in rare cases that magistrates would be willing to make consent orders in respect of children before the circumstances of the case have been fully investigated.

THE PROCEDURE ON APPLICATION FOR AN ORDER

79. We turn now to the procedure on application for a matrimonial order (other than a consent order). In this section we are discussing the procedure for orders in respect of spouses, although from time to time reference is made to the children. Orders in respect of children are discussed later, but it is worth saying at this point that we take the view that the principle of the 1960 Act (namely that the court must consider the interests of the children of the marriage regardless of its adjudication about the parents) should be retained.

RECONCILIATION

80. Application would in the first instance be to a single justice (we deal with the question of jurisdiction later). We

have considered whether it should become a statutory requirement that the possibility of reconciliation be considered at the time of application. Various procedures are at present adopted. In a number of courts there is a preliminary meeting between the applicant, the justices' clerk and a justice, often with the court probation officer in attendance, at which, in addition to considering whether a summons for a matrimonial order should be issued, reconciliation is mentioned and where there is a prospect of reconciliation the services of the probation officer are engaged. In the divorce court section 3 of the 1969 Act requires the solicitor acting for a petitioner for divorce to certify whether he has discussed with the petitioner the possibility of reconciliation and given him the names and addresses of persons qualified to effect a reconciliation. Section 59 of the Magistrates' Courts Act 1952 envisages the possibility that a magistrates' court may request a probation officer or any other person to attempt to effect a reconciliation between parties, and presumably this can be done at any time during the proceedings.

81. We are of the opinion that the procedure under the 1969 Act would not be altogether satisfactory for the magistrates' courts because, despite the availability of legal aid, not all parties who proceed before the magistrates' courts are represented by solicitors. Moreover, we believe that the procedure under section 59 of the Magistrates' Courts Act 1952 also has disadvantages. The chances of effective conciliation may well be diminished in the magistrates' courts by the parties' awareness that, although the report upon an attempted conciliation cannot be received in the court as evidence, it may nevertheless be seen by the court.

82. We have considered whether it may not be desirable to replace the existing provisions of the magistrates' law, which already implicitly recognise the value of reconciliation

in matrimonial cases, by a statutory procedure requiring the court in every case to explore the possibility of reconciliation with the parties. On the one hand, it can be said that if the court considers there is any prospect of a reconciliation, this prospect ought to be fully explored. On the other hand, if a spouse comes to court genuinely in need of financial relief, genuinely in fear of molestation from her husband and genuinely desiring protection for her children, she should not be deprived of immediate assistance in obtaining her rights. There is, we consider, a balance to be struck here between securing what may be the long-term interests of the parties and of the family by exploring the possibility of reconciliation, and protecting their short-term interests by providing the relief for which they have applied. This is a matter in which the courts must intervene with great tact and caution, and we see no reason why they should be deprived of the discretion made available under the present law. However, whilst we are content to leave the matter to the judgment of the courts as to how to proceed in individual cases, we nevertheless think that the existing provisions relating to conciliation, which are contained in section 59 of the 1952 Act, are not altogether satisfactory. We think that the right solution is to place the existing powers on a more regular footing. We therefore suggest that, in the reformulated magistrates' law, there should be placed on the courts a duty to consider the possibility of reconciliation and to direct the parties' attention to this possibility; and that it should be expressly provided that, if the court considers at any stage in the proceedings that there is a reasonable possibility of a reconciliation, the court may adjourn the proceedings and may request a probation officer or other person to attempt to effect a reconciliation between the parties.

83. As to the timing of the intervention to help reconciliation, one further point needs to be made. The view

has often been expressed that once proceedings in the magistrates' court have started the chances of reconciliation are greatly reduced. But whether this is so or not, there is considerable evidence to show that reconciliation can occur not only before the summons is issued, but also during or after the proceedings, since, in many cases, orders cease to have effect by virtue of section 7 of the 1960 Act upon the parties resuming cohabitation. It is for this reason that we have suggested that the court should be able to adjourn the proceedings at any stage. The adjournment should be for such period as the court thinks fit to enable attempts to be made to effect a reconciliation.

THE INTERIM ORDER

84. At present, magistrates' courts have power to make an interim order for maintenance (and, where there are special circumstances, for custody or access) before final adjudication, but this power can be exercised only where the court adjourns the hearing for more than a week or is of the opinion that the case would be more conveniently dealt with by the High Court (section 6(1) of the 1960 Act)) Maintenance may be ordered either for spouses or children. We think that it might be possible to extend this power so as to enable a court to make an interim order for maintenan at any time after the applicant makes her initial complaint and the summons is issued. (We deal with the question of interim orders for custody or access in paragraph 158 below This would seem a desirable and necessary addition to the magistrates' powers, if it is practicable, since various factors such as the pressure of business, and the time required for the parties to seek legal aid and for their advisers to prepare their cases, in some magistrates' court mean that often a hearing cannot be arranged within less than 2 months of the initial application. The Supplementar Benefits Commission can, of course, relieve absolute need

during this period, but not all the women applying for relief in the magistrates' courts will be eligible for benefits; some of them, for example, may be working full-time. We have therefore considered whether it should not be possible to make an enforceable interim order available at any time after the initial application is made.

85. The first possibility we considered was an *ex parte* order. The procedure that we envisaged was that the applicant should, at the time of making her complaint, apply to the court for an interim order and complete a simple means questionnaire, on the lines of that already used in a number of courts. The means questionnaire would assist her in assembling the relevant facts about her means and would enable the court at this preliminary stage to determine what level of order it should make to relieve her needs. So far as the respondent is concerned, at this preliminary stage the court would have to rely upon the applicant's estimate as to his current earnings, which she would state upon the means questionnaire. If the court decided to make an interim order, the order would then be served upon the respondent together with the summons and a copy of the wife's means questionnaire and would become enforceable from the date of service. When making the interim order the court would fix a date for the full hearing and the interim order would continue until that date. Such a procedure would have the advantage of giving the applicant an immediately enforceable order, but it would, we think, give rise to serious difficulties of principle. If the respondent were shown in the subsequent proceedings to be liable to maintain his wife, all well and good. The interim order would have secured the right result by providing immediate financial assistance for his wife and children and discharging from the outset any liability to maintain he may have. If, on the other hand, the subsequent proceedings showed the husband not to be liable to maintain his wife, then he would have good reason to feel aggrieved. For he would have been ordered to maintain

his wife when he was not liable to do so, without having been given any opportunity of contradicting her statements or of making a statement on his own behalf. Our own view is that, whilst we should not wish husbands to be relieved of their responsibilities towards wife and children if there is a liability to maintain, we think it undesirable that the courts should be empowered to make enforceable orders without at least giving the defendant an opportunity to be heard.

86. It may be argued that no great harm would be done by an *ex parte* procedure on these lines because an aggrieved or awkward respondent would merely ignore an interim order of this kind. Then, if he were subsequently found not to be liable, the court would have power to remit any arrears. As for the respondent who did comply with the order, if he were subsequently found not to be liable, it would be possible to provide some means by which any payments he had made to his wife could be recovered. For our own part, we think that these arguments are unsound. It seems to us to be wrong in principle to provide a procedure under which husbands in the hope that they would subsequently be found not to be liable, would be, as it were, invited to disobey an enforceable order, thus bringing the law into disrepute. Moreover, we think that any proposal which would require the wife to repay any money she had received under an interim order of this kind would give rise to great difficulties. In practice, by the time that the husband were found not to be liable to maintain his wife, she would have spent any money received from him by way of payments under an interim order.

87. We have therefore considered whether it may not be possible to devise an alternative procedure under which a wife in need of immediate financial relief would be able to obtain an interim order for maintenance, but there would be some safeguard for the respondent who considered that he was not liable to maintain her. Such a procedure might be

substantially similar to the existing procedure provided by section 6 of the 1960 Act, which it would subsume, but with certain modifications introduced to facilitate the making of an order at an early date. The procedure we envisage would be on the following lines. When making her initial complaint, the wife would be invited to fill in a simple means questionnaire, which would include a question about her husband's current earnings and employment situation. The means questionnaire, together with the summons (which would be returnable on a date no more than, say, 21 days ahead), would then be served upon the respondent and he would be given an opportunity both to answer a simple means questionnaire of his own and to make representations within a given period of, say, 14 days as to the amount of any interim order or why an interim order should not be made. If no representations were received, the court would proceed to make an interim order. If representations were received, then both parties would be given an opportunity to present their case to the court on the date for which the summons was returnable, and the court would determine whether or not it was appropriate in the circumstances to make an interim order and, if so, for what amount. If, for any reason, the court was unable to hear the case on the date given in the summons, we suggest that it should be made possible for a single magistrate, sitting in private, to consider the application and, if appropriate, to make an interim order. We envisage that, when making the order, the court or the single magistrate should fix a date for the full hearing. The interim order would continue in force until that date, or if the hearing was still unable to take place, until the next date fixed, subject to an overall time limit.

88. We have considered whether it would be desirable to compel the applicant or the respondent to complete the means questionnaire and to provide special penalties against either of the parties for giving false information. We think it unnecessary to compel completion of the questionnaire by the

respondent. If he chooses not to make representations, and an interim order is made, the magistrates will have power to secure his presence in court at the substantive hearing and it will then be possible for him to be examined orally as to means. He cannot escape his obligations by not attending the substantive hearing since, provided the magistrates are satisfied that he has been served with process, they can make an order even in his absence. Furthermore it seems undesirable to compel completion of the questionnaire because this might suggest that the issue had in some way been prejudged; it will be necessary to frame the interim order and the questionnaire in such a way that it is clear that the substantive issue has not been predetermined. Accordingly we do not recommend that there should be any compulsion upon the respondent to complete the questionnaire. On the other hand, we think it right that the applicant for an interim order of the kind we are proposing ought to be required to complete a simple means questionnaire. Such a questionnaire would enable her to assemble all the relevant facts about her means, and to set them out in a clear manner which will readily be understood by the respondent.

89. Turning to the question of sanction against giving false information or withholding information, we are reluctant to import any more elements of the criminal law than are absolutely necessary into the magistrates' matrimonial jurisdiction, but we think it right that the applicant and the respondent alike should be subject to penalties if they knowingly give false information in their questionnaires. We suggest that at the hearing before the single magistrate any evidence given should be on oath.

90. At the full hearing, it would be helpful to the court to be able to have regard both to the applicant's questionnaire and to that of the respondent, if he has decided to complete one. We therefore suggest that the questionnaires should be admissible in evidence, though we should not want them to be used in place of oral evidence as to means if the

were challenged. Both parties would be able to cross-examine upon the basis of the questionnaires. Moreover, if on the basis of the questionnaires the court considered that it still had insufficient information about the parties' means upon which to determine the amount of the order, there would be power available under section 60 of the Magistrates' Courts Act 1952 to ask a probation officer to enquire into the parties' means.

91. It is no part of our intention, in outlining this new procedure for an interim order, to deprive magistrates' courts of their existing powers, under section 6(1)(a) of the 1960 Act, to make an interim order on adjourning the proceedings for any period greater than one week. It is possible to envisage circumstances in which, given the existence of the new procedure we are proposing, such a power might still be useful. For example, the woman applying for a maintenance order on one of the new grounds we have proposed may not be in immediate need of relief at the time of her application - her husband may still be maintaining her. It would not be appropriate, we think, for the court or the single magistrate to make an interim order in these circumstances. If, however, in between the time of the original application and the date for which the summons is returnable, the husband decides to stop maintaining her, there may well be a need for her to obtain urgent financial relief. The court may think it right in such circumstances, if there is any need for the hearing to be adjourned, whether for an attempted reconciliation to be made or for some other purpose, to make an interim order to tide the woman over. We therefore suggest that the powers of magistrates' courts to make interim orders should be exercisable either before the hearing or on adjourning the hearing for any period greater than one week.

92. Section 6 of the 1960 Act at present imposes an overall time limit of 3 months on the duration of an interim order for maintenance. This may be thought to be rather an arbitrary limitation, but we think it right that there

should continue to be some such time limit, if only to provide a spur to the court and the parties in bringing on the final hearing. We have considered whether to propose that the time limit should be extended to 6 months or that an order should be capable of running on indefinitely, thus taking on the status of a final order, but we rejected both these ideas on the grounds that an interim order is no substitute for an order made in substantive proceedings and in either case unreasonable delay might be encouraged. On the other hand, we think there might be merit in providing for an interim order to be capable of extension, on application, for a further limited period of, say, one month. We should welcome views.

93. By virtue of section 6(1)(c) of the 1960 Act, the High Court has power to make an interim order where it directs a re-hearing of the case by the magistrates under section 5 or on an appeal from, or from the refusal of, a matrimonial order (including an interim order containing more than a money provision). In general, we think these provisions are satisfactory and should be retained. But there is one aspect of them where we think there is room for improvement. In *Bould v Bould*[41] the Divisional Court gave some thought to the question whether there was power under the existing law to antedate an interim order made on appeal to the date of the final determination in the magistrates' court, but concluded that there was no such power. Sir Jocelyn Simon P said: "It may be urged that a construction whereby there is no power to antedate interim orders might cause hardship to a wife who has been wrongly left without support and who may have run up debts; and so far as appeals are concerned it is far from infrequent for a husband to cease paying under an

41. [1968] P. 262.

order which is subject to appeal... it may be, therefore, that there is a lacuna here which might merit the attention of the Law Commission or Parliament - whether there should not at least be some power in this court or a court appealed from to order interim maintenance pending an appeal."

94. Where there is a maintenance order in being, and the husband has ceased complying with it pending determination of his appeal against the order, we cannot see that there is any lacuna in the existing powers of the magistrates. The order remains enforceable in the usual way (see Part III of the Magistrates' Courts Act 1952) unless and until it is revoked or discharged on appeal. But we recognise that, in cases where the magistrates' court has refused to make a maintenance order, and the wife appeals to the High Court from the refusal, real hardship can occur in some cases because of the length of time which is likely to elapse before the appeal can be heard. We can see no way of meeting this hardship through the magistrates' courts.

95. Before determining whether or not there is any lacuna in the powers of the High Court, as appellate authority from the decisions of magistrates' courts in matrimonial cases, we need to consider the range of possible situations which may arise. We consider first the situation where the magistrates' court has refused to make a matrimonial order, and the wife has appealed from this decision. If the appeal fails, there is an end to the matter. If, on the other hand, the appeal is successful, there are several possible outcomes. The Divisional Court may make a maintenance order itself; or it may make an interim order and remit the case for re-hearing in the magistrates' court; or it may simply remit the case for re-hearing without making any order. If the Divisional Court decides to make an interim order in these circumstances, we consider that power to antedate the order would

be desirable. Accordingly, we propose that such a power should be made available to the Divisional Court.

96. The other situation which may arise in the Divisional Court is that where, as in *Bould v Bould*, the magistrates have made a maintenance order and the husband has challenged this decision on appeal. If the appeal fails, again there is an end to the matter. If, on the other hand, the appeal succeeds, there are several possible outcomes. The Divisional Court may vary the amount of the order; or it may discharge the order, make an interim order for maintenance and remit the case for re-hearing in the magistrates' court; or it may discharge the order without making an interim order and remit the case for re-hearing; or it may discharge the order altogether. No problems occur where the Divisional Court varies the amount of the order. But in the other three cases problems may sometimes occur. If the Divisional Court decides to discharge the magistrates' order and to make an interim order pending a re-hearing, the wife will not be able to recover any arrears which have accumulated under the magistrates' order because that order will fall to treated for enforcement purposes as never having been made. We can see no reason why the Divisional Court should not have power, if it thinks fit, to antedate the interim order in these circumstances, giving full credit to the husband for any payments he has made under the magistrates' maintenance order.

97. We have recognised that, in certain cases, hardship may be caused to a wife pending determination of an appeal (whether by herself or her husband) from the magistrates' decision because of the length of time which may elapse before the appeal is heard. We have suggested, to help meet these difficulties, that the Divisional Court should have power to antedate any interim order which it makes. If the wife is to be allowed the benefit of these provisions, we think it only reasonable that the husband should be eligible

to receive no less favourable treatment. Suppose, for example, that the magistrates make an order for maintenance, from which he successfully appeals to the Divisional Court; and the order is discharged altogether. The husband in these circumstances is at some disadvantage under the existing law. If he fails to comply with the order pending determination of the appeal, then he is liable to enforcement action initiated by the wife. If he does comply with the order, even though confident that his appeal, when heard, has every chance of succeeding, there appears to be no means at present by which he could subsequently recover the sums he pays. We have sympathy for the husband who has complied with a magistrates' order for a long period, even though aware that his appeal, when heard, stands every chance of succeeding. We suggest that, to meet this or other circumstances, the Divisional Court should have power to order repayment of some or all of any sums received by way of payments under a maintenance or interim order whenever it thinks that such repayment is just. Such a power might be modelled on section 11 of the 1970 Act which provides for the divorce court to order the person who has received payments under certain orders to repay them in certain cases.

98. To summarise our thinking on the subject of interim orders, we provisionally propose that magistrates' courts should have power to make an interim order at any time before the final determination of an application for a matrimonial order. We further propose that, in addition to the powers already available to the High Court as appellate authority from the decisions of magistrates' courts in matrimonial cases, the High Court should have power, if it thinks fit in all the circumstances of the case, to antedate any interim order which it makes to a date not earlier than the date of application to the magistrates' court for a matrimonial order; and that the High Court should have power, on an application by the person liable to make payments under a magistrates' order, if it thinks fit in all the circumstances

of the case, to order the person in whose favour the order was made to repay some or all of the sums received by that person as payments under the order. It should be expressly provided, we suggest, that an interim order made by the Divisional Court should continue in force for up to 3 months from the date of the appeal hearing, or until the re-hearing in the magistrates' court, whichever is the sooner, irrespective of any period for which it is antedated.

THE EFFECTIVE DATE OF THE ORDER

99. Powers to antedate an interim order made on appeal give rise to the wider question of what should be the effective date from which a maintenance order may operate. The question of retrospective orders was also considered in *Bould v Bould*.[42] Sir Jocelyn Simon P accepted that there was power for both the divorce court and magistrates' courts to backdate an order but he mentioned that there was some judicial doubt about the exact date from which a maintenance order can be made to run. This is a point which might suitably be clarified in the new magistrates' legislation. We suggest that it should be expressly stated that maintenance can be ordered to be paid from a date earlier than the hearing, but not earlier than the date of application for the order.

100. There should also, we suggest, be power to make an order operating from a future date. Such a power would be useful where a man is unemployed at the time of the hearing but has arranged to start work in the near future. It is much more convenient for everyone concerned that an order should be made which will operate from a date after he had started work than that the case should be adjourned and the parties have to attend another day.

42. [1968] P.262.

USE OF THE MEANS QUESTIONNAIRE

101. We have suggested, in the context of the new interim order procedure we propose, that it should be compulsory for the applicant to complete a simple means questionnaire on the lines of those already used in a number of courts; that the applicant's questionnaire, together with the summons, should then be served on the respondent, who should be given an opportunity to complete a means questionnaire of his own; that penalties should attach to false information knowingly given; and that the questionnaires should be admissible in evidence (paragraphs 87-90). We see no reason why these suggestions should not apply equally to other applications under the reformulated magistrates' matrimonial law, whether for a substantive maintenance order or for variation or enforcement of such an order. This is not a new idea by any means. It has been put forward before, notably in 1968 by the Graham Hall Committee. The Committee argued in paragraph 222 of their Report [43] that the parties were not put sufficiently on notice before the hearing of the matters about which the court would need to be informed. Defendants did not disclose all their earnings or sources of income to their wives, and the courts were often forced to rely on their knowledge of the average rates of a particular trade in the locality. Even when evidence was produced, it might relate only to one week's earnings which would often not be a typical amount. To meet these criticisms of the existing arrangements, we suggest that the magistrates should be given power to require the applicant for a maintenance order, or for variation or enforcement of such an order, to complete a standard means questionnaire to be prescribed. The applicant's questionnaire should then be served on the respondent, who should be invited, but not compelled, to complete a questionnaire of his own. Penalties should attach to false information knowingly given, and any questionnaires completed should subsequently be admissible in evidence.

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43. *Report of the Committee on Statutory Maintenance Limits*, (1968) Cmnd. 3587.

PROCEDURE AT THE HEARING

102. The procedure at the hearing will to some extent be affected by the changes we propose in the substantive law. In particular, the reframed substantive law is intended to encourage proceedings in which matrimonial conduct will not be a matter at issue. The procedure will, however, vary according to whether the claim is opposed and to the nature of the opposition. In all cases, the applicant will open the proceedings by giving evidence in support of her claim for maintenance. If her case is a purely financial one and the respondent does not advance a defence of conduct the court would be able to proceed at once to a final order on the basis of evidence as to means, whether given orally or in any means questionnaire which may have been completed. But if she is relying upon the conduct ground, she will have to establish that ground as well as her financial case. The court will therefore have to consider conduct before proceeding to a final order, unless the respondent does not advance a case either defending his own conduct or attacking hers. (The court will, of course, in any case have to consider the position of the children of the family, if there are any.) There will be no restriction on adjournment to secure fuller information about means or family circumstances, and the court would be able to make an interim order if it thought appropriate.

103. One difficulty about this procedure under the reformulated substantive law which we have proposed is that if the applicant is not aware that the respondent is going to raise her conduct as a defence until the court hearing, there may be an application for an adjournment. To minimise this risk of delay, we suggest that there should be introduced into the magistrates' procedure some very simple form of "pleadings". To a limited extent "pleadings" already occur in cases where there are allegations of adultery,[44] and we do not think that an extension of this arrangement would jeopardise the summary nature of the proceedings, provided a simple procedu

44. See *Duffield v Duffield* [1949] 1 All E.R. 1105.

could be devised. We suggest a procedure on the following lines. The summons would inform the respondent of the grounds upon which the applicant was applying for an order and he would be requested to indicate whether he proposed to contest the application and, if so, on what grounds. It would not in our view be desirable to compel him to indicate what defence he proposed to raise, nor do we think that he should be prevented from changing his mind, but, particularly where the parties are represented, a procedure of this kind would help to ensure that at least in the majority of cases both parties were aware in general terms of what the other was going to say in court.

104. We realise that if either party advances conduct, whether as a ground for or a defence against the making of a matrimonial order, the court will have to review conduct in detail. This is unavoidable if conduct is still to be taken into account by the magistrates in determining whether or not to make an order and, if so, for what amount. We hope, however, that under the substantive law and procedure which we have proposed the number of cases which are contested on the grounds of conduct will be substantially reduced.

REASONS FOR DECISIONS

105. The magistrates' matrimonial jurisdiction is sometimes criticised on the grounds that the parties are not informed of the reasons for the decision which the magistrates make, and that the reasons which the magistrates state for a case which is to go on appeal to the Divisional Court are often prepared some time after the event and are therefore possibly not as accurate as they might be, had they been set out sooner. We do not consider that these objections alone provide a sufficient basis for altering the general principle which operates in the courts of summary jurisdiction, that the court is not required to give oral reasons for its decision. On the other hand, if conduct is still to be taken into account in determining the amount of the order, there

may be a danger of injustice in circumstances where another court, perhaps at the opposite end of the country, comes subsequently to hear an application for the variation of an order.[45] If the case is one where the original court had decided that the applicant's conduct was such that the amoun which the respondent would otherwise be required to pay should be reduced, the varying court is unlikely to be aware of this in determining the application and may thus be tempted, having regard to the respondent's current means, to var the order upwards.

106. We have therefore considered whether the justices should be required to place on record on making an order (whether an original order or one on an application to vary or revoke) the factors which they took into account in determining the amount of the order. In principle, we think that such a requirement would have much to commend it, especially if the court is to be given power to reduce the amount which it would otherwise have ordered by reason of the applicant's conduct. But we recognise that it may be a distressing experience for the applicant to hear stated in open court that the justices took an adverse view of her conduct. We therefore suggest a procedure under which the court should be required to make a note of the factors which were taken into account in determining the amount of the order and to preserve it in the court records. We do not think it necessary that the note should be made immediately after the hearing, nor do we suggest that the order should be noted to like effect, but we think that some record should be set down within a reasonably short time of the hearing, certainly not later than a week. The record should be available as of right to the parties (as the justices' reasons are now available as of right on request for the purpose of appeal). We suggest that a system could be

45. This matter has recently been considered, in relation to High Court orders, by the President of the Family Division and subsequently by the Court of Appeal. (*Ackerman v Ackerman* [1972] Fam.1; [1972] Fam.225,C.

devised without much difficulty to make the record available to any courts which hear subsequent proceedings, as part of the machinery provided by Rule 34 of the Magistrates' Courts Rules 1968 (jurisdiction to hear variation etc proceedings). The record should be admissible in any subsequent proceedings as evidence of the matters contained therein. We appreciate that a procedure on these lines would place upon the courts a further burden of record keeping and of transmission of documents, but the framework for such a machinery already exists and we do not think that in practice it would involve much work in addition to that which already needs to be done.

OTHER MATTERS

107. In the preceding paragraphs of this section we have set out our proposals for changes in the procedure for hearing matrimonial proceedings in magistrates' courts, which will, we hope, enable the courts more readily to achieve the objectives of this jurisdiction. There are certain other matters of procedural detail which we think it would be appropriate to discuss before passing on to the major subject of orders in respect of children.

JURISDICTION

108. Section 1(2) of the 1960 Act gives jurisdiction to any one of three courts, namely the court of the petty session area where the applicant ordinarily resides, the court of the petty sessions area where the respondent oridinarily resides or the court of the petty sessions area where the matrimonial offence occurred. The choice of court lies with the applicant. We think that one of the consequences of the reduction of emphasis on the matrimonial offence which we are proposing will be that in the great majority of cases it will be unnecessary to give jurisdiction to any other courts than those acting for the petty sessions area where either the applicant or respondent lives. If however jurisdiction were limited in this way, inconvenience might

be caused where, for example, both spouses have moved from the area where they had their matrimonial home and they wished to call evidence from those who knew them when they lived in that area. It seems desirable that the application should in the first instance be made to the applicant's or respondent's home court, but when that has been done that court should have a discretion, on the application of either party, to transfer the proceedings to another court which might be more convenient to the parties or their witnesses. Thus, the procedure for establishing jurisdiction to hear an application for an original order might be on the same lines as that provided in Rule 34 of the Magistrates' Courts Rules 1968 (jurisdiction to hear variation etc proceedings). We suggest that jurisdiction could be established by rules of court, and that the Act should provide simply that an application for an order should be made to a magistrates' court by way of complaint; this would import the power to make rules to establish jurisdiction under section 122(1) of the Magistrates' Courts Act 1952.

109. Whereas the criminal jurisdiction of the magistrates is related to the area of the Commission of the Peace (i.e. the county, once the Local Government Act 1972 is in force), their civil jurisdiction is related to the petty sessions area. We can see no reason for preserving this anomaly and we suggest that the reformulated matrimonial law should amend Part II of the Magistrates' Courts Act 1952 so as to provide for complaint to be made to a magistrates' court acting for the county. Such an arrangement would allow for greater flexibility and would help to meet the criticism, which is sometimes made, that a hearing might be prejudiced by the fact that a particular Bench had prior knowledge of the circumstances or that the parties might be embarrassed by personal acquaintance with all the available justices.

110. We do not think it necessary to comment on the arrangements for hearing proceedings when the parties are in different parts of the United Kingdom or when one party is

outside the United Kingdom. The provisions of sections 1(3) and 9 of the 1960 Act will, therefore, be unaffected by our proposals.

THE RELATIONSHIP BETWEEN MAGISTRATES' COURTS AND THE DIVISIONAL COURT

111. We regard it as largely outside our terms of reference to consider the question of appeals (this being a matter better suited for consideration by the Family Courts Working Party), but we appreciate that our proposals for changing the substantive magistrates' law do have certain direct implications, which cannot be overlooked, upon the relationship between the higher and the lower courts. These are discussed in the following paragraphs.

112. Section 5 of the 1960 Act gives magistrates power to refuse to make a matrimonial order where they are of the opinion that any of the matters in question between the parties would more conveniently be dealt with by the High Court. This section confers no jurisdiction on the High Court, and the magistrates may employ their powers under it where the High Court has concurrent jurisdiction.[46] In *Hinchcliffe*, Sir George Baker P said in relation to an appeal relating to section 5 of the 1960 Act, "I would add only this, that now and in the future the question [of the use of section 5] is academic and unlikely to arise because of the change of the ground of jurisdiction in the High Court from the magistrates' court. The magistrates' court continues to act on the proof of a matrimonial offence; the High Court acts on the grounds of irretrievable breakdown." We have considered whether, in the light of the changes we propose in the substantive law in the magistrates' court, it is necessary or desirable to retain in the magistrates' law

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46. *Perks v Perks* [1946] P.1; *Davies v Davies* [1957] P.357; *Hinchcliffe v Hinchcliffe* (1971) not reported.

a provision which would enable the magistrates to refuse jurisdiction where they consider the case would more conveniently be dealt with by the High Court. On the one hand, it can be said that the powers given by section 5 no longer serve very much useful purpose because there is little substantial overlap between the magistrates' jurisdiction and that of the divorce court. The only cases in which jurisdiction will be concurrent will be those on the ground of failure to provide reasonable maintenance; application will be possible in such cases either under the reformulated magistrates' law or under a reformulated section 6 of the 1970 Act. Moreover, there is the argument that, if it is thought right that the magistrates should have jurisdiction to try a certain type of case, they should not be able to decline to exercise that jurisdiction in a particular instance because they find the case difficult. On the other hand, it must not be overlooked that the powers of the divorce court under section 6 of the 1970 Act are rather wider than those of the magistrates will be, in that they include powers to order secured periodical payments and payment of an unlimited lump sum. If the case before the magistrates is one in which the defendant has substantial assets, it may be thought reasonable that the magistrates should be able to decline to proceed with the case on the ground that it would more conveniently be dealt with by the High Court. We make no proposals and suggest that the point is one which should be further pursued by the Family Courts Working Party, which is expressly concerned with the jurisdiction of the various courts empowered to deal with family matters.

113. There is a further point arising from the discussion in the previous paragraph. Where matrimonial proceedings are pending in the divorce court when an application for a matrimonial order is due to be heard by the magistrates, it was held in *Kaye v Kaye*[47] that the magistrates have jurisdiction to hear the case, but that save in exceptional circumstances

47. [1965] P. 100.

they should, as a matter of convenience and public policy, exercise their discretion to adjourn the proceedings before them until the High Court proceedings have been disposed of. In *Lanitis v Lanitis*[48] a wife's urgent need for maintenance and the unsatisfactory situation of the children were held to be exceptional circumstances which justified the magistrates in proceeding with the hearing of the wife's application although a petition for divorce had been filed by the husband the day before the hearing. Ormrod J[49] said:-

> "...the magistrates in this class of case should be wary and on the look out for this tactical manoeuvring which I have mentioned before; and they should be alert to see that they are not used, and do not permit themselves to be used in this fashion by parties filing petitions in the High Court at the last minute with the major object of frustrating the magistrates' jurisdiction."

Bearing in mind these considerations, we suggest that there should not be any statutory limitation on the powers of magistrates where there are concurrent proceedings in the divorce court. We see it as an essential feature of the magistrates' jurisdiction that relief, whether financial or of other kinds, should be speedily available. It would be undesirable for a respondent to be able to delay the applicant's obtaining financial relief simply by proceeding for matrimonial relief in the divorce court. We consider that magistrates should continue to "look at the whole thing and as a matter of public policy and general convenience decide what is the right thing for them to do".[50]

114. The divorce court has discretionary power to discharge an existing magistrates' court order during proceedings between, and relating to the marriage of, the parties

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48. [1970] 1 W.L.R. 503.
49. *ibid.*, p. 510.
50. *ibid.*, p. 509.

(section 7(3) of the 1960 Act, as amended). We consider that this discretionary power should be retained. There is no reason to discharge an existing order the terms of which are satisfactory. At the same time, it is convenient in a case where the magistrates' order is to cease (for example, because the parties have reached an agreement for financial provision to be made by the divorce court), that it should be possible to revoke the order without having to make a separate application to the magistrates' court.

115. In connection with the relationship between the Divisional Court and the magistrates' court in this jurisdiction, it has been suggested to us that when the magistrates have made a matrimonial order in the absence of the respondent, they should have power to hear an application for a re-hearing if the respondent can show good cause for his absence and that he has a *prima facie* defence (rather than it being necessary to appeal to the Divisional Court as at present). As we have remarked, questions relating to the alleged inadequacy of the present appeal system in matrimonial matters do not fall within our terms of reference, but within those of the Working Party on Family Courts. Nevertheless we think we should mention the issues involved, which are by no means clear cut, in order to canvass views.

116. It is clear that the present procedure can give rise to long delays before an appeal is heard by the Divisional Court and this can cause hardship to the applicant if the original order is subsequently set aside and new proceedings have to be instituted before the magistrates. This suggests the need for a prompt and local remedy. On the other hand, to give a right to apply for a re-hearing on the ground that the order was made in the absence of the respondent might lead to abuse, and, by delaying the effective date of an order, could cause equal hardship to the applicant. Moreover such a right to apply might encourage the magistrates to proceed more frequently in the defendant's absence, a development which we should not have thought desirable. If therefo

a power to hear an application for a re-hearing were to be given to the magistrates, it would need to have stringent safeguards attached to it.

PART IV

ORDERS IN RESPECT OF CHILDREN

THE NEED FOR RATIONALISATION

117. Up to this point we have been concerned with the consequences of the recent divorce court legislation for the magistrates' matrimonial jurisdiction when they are exercising that jurisdiction over the parties to a marriage. We have thought it best to isolate this aspect of the jurisdiction since the issues that arise in formulating the substantive law and procedure can be considered independently of a consideration of the court's powers in respect of any children who are involved in the breakdown of the marriage. This is not to say that we do not attach the greatest importance to the court's powers to make orders in respect of children. Indeed, when a broken marriage is brought before the court, one of the court's primary duties must be to consider the welfare of any children. This is, in fact, a principle of the present magistrates' matrimonial law. Section 4 of the 1960 Act requires the magistrates to consider issues relating to the children of the family whether or not it makes an order on the applicant's complaint (that is, whether or not it finds the "matrimonial offence" proved) We see no reason to depart from this fundamental principle. There are, however, certain matters which in our view need attention, both because the recent legislation has rationalised the divorce court's powers in respect of children in a way which leaves the magistrates' powers in respect of children affected by matrimonial proceedings even more out of line than they were hitherto, and because the powers of the

magistrates in the related children's legislation (the Guardianship of Minors Acts 1971 and 1973[51] and the Affiliation Proceedings Act 1957[52]) differ unnecessarily from their powers with respect to children under the 1960 Act.

118. The Matrimonial Proceedings and Property Act 1970 rationalised and modernised the powers of the divorce court to make orders for children. In particular the definition of "child of the family" was widened and the provisions as to the age at which maintenance for children should cease were rationalised. In both of these matters the magistrates' matrimonial law is out of line with that of the divorce court, as it is in respect of the age to which orders for custody, supervision and committal to care can run (although this disparity was not created by the 1970 Act). We see no reason in principle why the powers of the courts in these matters should differ according to whether they are dealing with the children of a marriage that is still in being or of a marriage that has been dissolved; or why their powers should differ in respect of legitimate and illegitimate children; or why they should differ because an application in respect of the child is made under the guardianship rather than under the matrimonial law.

119. The need for rationalisation may best be illustrated by reference to Appendix 2 to this Paper, in which we have set out the existing provisions relating to children under the relevant Acts. The most obvious anomalies occur in respect of the ages to which maintenance orders can run, but there are other disparities in relation to custody, supervision and care orders.

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51. 1971 c. 3; 1973 c. 29.
52. 1957 c. 55.

120. In the following paragraphs we deal with orders in respect of children that we propose should be available in matrimonial proceedings; we then consider any consequential changes that may be necessary in the law relating to guardianship and affiliation proceedings. It is to be noted, however, that we are only suggesting changes in the law which will avoid anomalies between these proceedings and matrimonial proceedings. We are not proposing any change of substance in the basis of the guardianship or affiliation law.

121. Under the 1960 Act the magistrates in matrimonial proceedings can make orders for custody and access, committal to care, supervision, and maintenance of any "child of the family". We examine below each of these features of the law, starting with the definition of "child of the family" because this defines the scope of the magistrates' powers.

THE DEFINITION OF "CHILD OF THE FAMILY"

122. In section 16(1) of the 1960 Act "child of the family" is defined in relation to the parties to a marriage as -

(a) any child of both parties; and

(b) any other child of either party who has been accepted as one of the family by the other party.

The same section defines "child", in relation to one or both of the parties to a marriage, as including an illegitimate or adopted child of that party or of both parties, but excluding a child adopted by some other person or persons. In section 27(1) of the 1970 Act, the definition of "child of the family" is substantially different, being -

(a) a child of both the parties to the marriage; and

(b) any other child, not being a child who has been boarded out with the parties by a local

authority or voluntary organisation, who has been *treated* by both of the parties as a child of their family.

(The definition of "child" in section 27(1) is the same as that under the 1960 Act, with the omission of the reference to the child adopted by some other person or persons.)

123. We recommend that the existing definition of "child of the family" in the 1960 Act should be replaced by that in the 1970 Act, since it would be undesirable that the magistrates' courts, by virtue of having a narrower definition of "child of the family" than the High Court, should be unable to make orders in respect of certain children when, in similar circumstances, the divorce court would be able to make orders. If this wider definition is to be used, it would follow that the provisions of section 2(5) of the 1960 Act should be replaced by those of section 5(3) of the 1970 Act. Both these provisions require the court to have regard to the extent to which, and the basis on which, any party has taken on responsibility for a child of the family and the liability of any other person to maintain the child; section 5(3) of the 1970 Act also includes the length of time for which a party has discharged this responsibility and whether he knew that the child was not his own.

THE DURATION OF CUSTODY ORDERS

124 The 1960 Act at present limits the court's powers to make a custody order to children under the age of 16 (section 2(1)(d)). But the divorce court has power under the 1970 Act to make a custody order in respect of a child up to the age of 18 (section 18(1)). We have considered two issues here: first, whether the magistrates' order made when the child is under 16 should run until the child reaches 18; and secondly, whether the magistrates should have power to make a custody order *de novo* in respect of a child between the ages of 16 and 18.

125. Whether a magistrates' order for custody made under the 1960 Act before a child attains the age of 16 lasts until it reaches the age of majority at 18 is by no means free from doubt. A note in Stone[53] states that a custody order continues until the child is 18. This note was described recently by Sir George Baker P[54] as setting out what had been the settled practice. He drew attention to the confused state of the statute law on this point; he considered that the matter should receive the attention of the Law Commission and subsequently of the legislature. We see no reason why the magistrates' powers in this respect should be different from those of the High Court. We therefore propose that the magistrates should be given express power to make custody orders to last until the child reaches the age of 18. We are making this proposal not in order to put right a particular difficulty that has arisen in the past (at least, so far as we are aware), but in order to remove a possible cause of uncertainty for the magistrates and to make their powers consistent with those of the divorce court.

126. If our proposal is accepted, that the magistrates' custody orders should be capable of running to the age of 18, we see no reason why they should not have the same powers to make custody orders *de novo* in respect of children between 16 and 18 as the High Court. (For our proposals concerning custody orders made in guardianship proceedings, see paragraph 155 below.)

127. At present custody of a child may be awarded to either party to the marriage or to some other individual (this is the implication of section 2(1)(e) of the 1960 Act). We think it desirable that this should be made explicit.

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53. Stone's Justices' Manual (1972 edition), p. 1429.
54. *C v C*, "The Times", 5 July 1972.

THE "SPLIT ORDER"

128. Magistrates at present have wider powers under the guardianship legislation than under the matrimonial legislation regarding the form of custody orders which they make. Under the guardianship legislation, they may make a "split order" under which the responsibility for a child is divided between husband and wife either by giving custody to one and care and control to the other or by giving custody to the husband and wife jointly with care and control to one.[55] Magistrates do not have power to make split orders under the 1960 Act.[56] The object of a split order is to give a father whose conduct may have been unimpeachable a say in, for instance, a child's education or religious upbringing although care and control are given to the mother. Whatever the merits of the split order may have been - and these are debatable - we think the provisions of the Guardianship Act 1973, giving equal rights of custody to both parents and thereby superseding the old common law rule giving sole custody to the father, have removed its *rationale*. It would be nonsensical to deprive a mother of her equal custody rights whilst leaving her with care and control. But this being said, we think provision might reasonably be made in the legislation we propose for the court, at its discretion, to leave equal rights of custody with both parents but (since the child can clearly only live with one at a time) to give care and control to one parent and to order the other to contribute towards the child's maintenance. We think this power should be available and should apply equally whether the proceedings arise under the matrimonial or guardianship legislation.

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55. *In re W (an infant)* [1964] Ch. 202; *Jussa v Jussa* [1972] 1 W.L.R. 881.

56. *Wild v Wild* [1969] P.33.

STAY OF EXECUTION

129. During the proceedings on the Guardianship Act 1973, it was suggested in Parliament that there was a need for magistrates' courts to be given an express statutory power to stay the execution of a custody order which they have made. A number of amendments to this effect were put down in the House of Commons. The Government, while fully accepting the intention behind the amendments, successfully resisted them on the ground that magistrates' courts already had authority to order a stay of execution and an express statutory power was unnecessary. But the Government spokeman, Mr. Mark Carlisle, Q.C., M.P., pointed out that the matter fell within our terms of reference and that there would be a further opportunity to look into it.

130. The existing powers of magistrates' courts to stay the execution of a custody order can be summarised as follows. Although there is no statutory provision that expressly empowers a magistrates' court to stay the execution of a custody order which it has made, it is clear, on the basis of decided cases, that magistrates' courts do have such a power, both in relation to applications under section 9 of the 1971 Act and applications under section 2(1)(d) of the 1960 Act. The main authority is *Re S. (an infant)*[57] where it was held that in appropriate cases the magistrates' court should direct that an order transferring custody from one parent to another should not take effect so as to allow an aggrieved party to ask the High Court to grant a stay pending appeal. This judgment was confirmed by Sir Jocelyn Simon P in *B v B*[58] when he said that the matter of the justices' power in granting a stay was put beyond doubt by the decision of the High Court in 1958. It was also stated in *Smith v Smith*[59] that although the first obligation is upon the advocate to ask for a stay of execution of the order pending an

57. [1958] 1 W.L.R. 391.
58. [1969] P. 103.
59. (1971) 115 Sol. Jo. 444.

appeal, if he does not do so the justices should consider and apply a stay of execution on their own order.

131. There is no doubt, therefore, that magistrates have the authority of decided cases to grant a stay. Moreover, there is every reason to think that the decided cases are well known to justices' clerks and that stays are already granted whenever there is a need for them. It might, therefore, be argued that there is no need for any express statutory provision to be inserted in the law. On the other hand, the extent of the existing power has never been precisely defined, and there is uncertainty about such matters as the effect of staying an order upon any related maintenance order. (Presumably, this too should be stayed.) Our own view is that magistrates' courts would find it helpful to have an express statutory discretion to stay the execution of a custody order and to be given guidance as to the circumstances in which such a power might be used. We should welcome views.

ENFORCEMENT OF CUSTODY ORDERS

132. The only power available to a magistrates' court for enforcing a custody order is that contained in section 54 of the Magistrates' Courts Act 1952, which provides for orders other than for payment of money to be enforced by a penalty not exceeding £1 for every day during which the default continues; or for commitment to prison until the defaulter has remedied his default.[60] A person may not be ordered to pay more than £20 or be committed to prison for more than two months in all under this provision for disobeying the order. Inflation has long since overtaken the financial penalties provided in section 54, and we suggest that the time has come when the daily penalty should be increased to £10 and the cumulative limit to £400. We do not see any need to increase the maximum term of imprisonment of two months.

60. We refer to this provision also in paragraph 70.

PROHIBITION OF REMOVAL FROM THE JURISDICTION

133. Anxiety was expressed during the proceedings on the Guardianship Bill about the apparent ease with which parties could flout an order as to custody - notwithstanding the power to stay the execution of such an order - by removing the child from England and Wales. An amendment was put down at Report stage in the House of Commons aimed at giving magistrates' courts power, on granting a stay of execution or otherwise, to prohibit the removal of a minor from the United Kingdom without the consent of the court. The Government successfully resisted the amendment, but undertook that the matter would be more fully considered by the Law Commission.

134. Magistrates' courts have no power at present to prohibit the removal of a child from England and Wales; but such a power is available to the divorce court, and there is a Direction to the effect that a provision prohibiting removal should be inserted in all decrees and orders as to custody unless the Judge otherwise directs.[61] It could, therefore, be contended that magistrates should also have such a power.

135. On the other hand, it must be doubtful whether such a power would serve much useful purpose in practice. Under existing arrangements, where there is a High Court order the Passport Office may be given notice that a passport should not, without leave of the court, be issued in respect of the child. In addition, where it is known that there is a real risk of the child's being removed from the jurisdiction, the Home Office will try to prevent unauthorised removal. We understand from the Home Office that if orders prohibiting removal were to increase, the number of requests might become so great that it would be almost impossible for the police

61. 8 May 1953, amended 8 March 1955 and 5 January 1959, as subsequently amended.

and the immigration service to operate the existing limited arrangements at the ports for preventing the unauthorised removal of children out of England and Wales.[62] It might, therefore, be argued that there is little point in pursuing what is really an ineffective remedy, and the better course would be to concentrate on the longer term possibilities of international arrangements for the reciprocal enforcement of custody orders. On the other hand, such a power in the magistrates' court might be useful and convenient, even though it would have to be recognised that it could not be effectively enforced.

136. This is a difficult area, and we make no recommendatic as to whether such a power to prohibit removal from the jurisdiction should be given to magistrates' courts. The matter will, in any event, be further considered by the Join Working Party of the English and Scottish Law Commissions on jurisdiction and the enforcement of custody orders. How- ever, we think it desirable to draw attention to the matter in our own Working Paper and to canvass views.

COMMITTAL TO CARE AND SUPERVISION

137. Section 2(1)(e) of the 1960 Act enables a magistrates court which considers that there are exceptional circumstanc making it impracticable or undesirable for a child under 16 be entrusted to either of the spouses or to any other individual, to commit the care of the child to a local authority this order ends at 18 by virtue of section 3(4) of the Act. The parallel provision for the High Court enables the court to exercise this power if the child is under the age of 17; such an order ends at 18 (section 36(4) of the Matrimonial Causes Act 1965). We see no reason for having the differen ages under these two provisions and we suggest that the magistrates' power should be the same as that of the High Court.

62. The authority for intervention by the Home Office (thrc Immigration Officers and police at the ports) is set out in a footnote to R.S.C., Order 90, rule 3.

138. The 1960 Act and the Matrimonial Causes Act 1965 make it possible for the courts to order that in exceptional circumstances a child may be placed under the supervision of a local authority or probation officer when it is committed to the custody of one of its parents or a third party. However, once again, the provisions of the Acts differ slightly. Under the 1960 Act (section 2(1)(f) and section 3(9)) a supervision order cannot be made after 16 and any order made before 16 ends at that age. Under the 1965 Act the power to make a supervision order is exercisable so long as an order for custody of the child lasts (i.e. not beyond 18) (section 37(1)). If the magistrates are to be given power explicitly to make orders for custody which will run to 18, and to make *de novo* orders after 16, we consider that it would be useful for them also to have the power to make supervision orders linked with these custody orders, since there may be circumstances in which it would be desirable for a local authority or probation officer to have a supervisory role in order to assist the parent or other person to whom custody has been awarded. For reasons of practice and principle, therefore, we suggest that the magistrates' power should be brought into line with that of the High Court.

139. Further, we propose that this power should be exercisable without restriction on the term of a supervision order (subject to its terminating at 18). The term of the order should be left to the discretion of the court, there being available a power subsequently to vary or revoke the order on the application of any interested party.

REPORTS ON CHILDREN

140. Section 4(2) of the 1960 Act provides that after the court has decided any question as to the inclusion in a matrimonial order of a non-cohabitation provision or a provision for the maintenance of a spouse and so is free to

consider the question of the children it may, if it has insufficient information for the purpose, call for a report by a probation officer or officer of a local authority into the relevant circumstances. Subsection (3) further provides that the report shall be made orally or read aloud in court and that if any party to the proceedings objects to anything in it the court shall require the author to give evidence on oath and any party may call evidence in rebuttal. These subsections have been criticised on a number of grounds, of which the most important is that if either party objects to anything in the report, the court must require the reporting officer to give evidence on oath. The court has no discretion, not even to disregard a point which is in error and not disputed by either party, or a point which is of little relevance or importance. The suggestion has also been made that the requirement that the report should be read aloud in every case is unnecessarily restrictive, and that section 4 should be amended to allow reports to be read silently if this is thought to be more appropriate. To meet these criticisms, we suggest that section 4(3) of the 1960 Act should be amended so as to provide the court with discretion to dispense with the reporting officer's giving evidence, unless one of the parties specifically wishes to call him, and to enable reports to be read silently if the court thinks this more appropriate - subject of course to copies being provided for the parties.

MAINTENANCE FOR CHILDREN

141. The magistrates' power to make orders for the maintenance of children is in need of rationalisation in a number of respects in consequence of the High Court reforms. As regards the nature of the orders to be made available (i.e. periodical or lump sum awards) the magistrates should, we suggest, be able to make the same types of order in respect of children as they can in respect of spouses. We therefore propose that the magistrates should no longer be confined to

making orders for the payment of weekly sums of money (section 2(1)(h) of the 1960 Act). The court should be able to order periodical payments (the length of the period being left to the discretion of the court). Furthermore we suggest that the court should, in appropriate circumstances, have power to award lump sum payments for children. We realise that the power may not be used frequently but we think it would be a useful addition to the magistrates' powers; for example, a lump sum of no great size would help to pay for school uniforms, or for a holiday for the children. As to orders for secured payments, the same considerations apply as were mentioned in paragraph 58, and we do not recommend that the magistrates should be given this power.

142. Section 2(1)(h) of the 1960 Act provides that while the child is under 16 payments of maintenance should be made to the person who has legal custody of the child (or to a local authority if the child is committed to care). If the child is over 16 and dependent, payments may be ordered to be made to such person as may be specified (who may be the child or a local authority). Under the 1970 Act payments are required to be made to the child or to such person as may be specified for the benefit of the child (section 3(2)). Though the effect of these provisions is much the same in practice (questions of personal taxation apart), we think that for the sake of consistency the magistrates' matrimonial law should be brought into line with the divorce law in this respect. A similar amendment should be made in the guardianship legislation (see paragraph 160 below).

143. As we are proposing that orders in respect of children should be made under the matrimonial law only when there is a dispute between the spouses, we do not propose any change in the law as to who may apply for an order for a child. This should continue to be one or other of the parties to the marriage.

144. We have set out in paragraph 56 of this Paper the factors other than conduct to which we think the courts should have regard in ordering maintenance for a spouse. We suggest that where the magistrates propose to make a maintenance order in respect of a child, the only additional factor to which they should have regard in determining the amount of the order should be the financial needs of the child (cf. section 5(2) of the 1970 Act).

145. The final question to be considered in relation to orders in respect of children is the age to which an order for maintenance should run. Section 2(1)(h) of the 1960 Act provides that maintenance may be ordered for a child of the family up to the age of 16 and, in certain circumstances, beyond but not later than the age of 21. If the child is 16 or over but not yet 21, an order can be made if it appears to the court that the child is a dependant. A dependent child of 16 or over is defined in section 16(1) as a child

> (a) receiving full-time instruction at an educational establishment or undergoing training for a trade, profession or vocation in such circumstances that he is required to devote the whole of his time to that training for a period of not less than 2 years; or
>
> (b) whose earning capacity is impaired through illness or disability of mind or body.

146. In the 1970 Act the matter is covered by the provisio of section 8. The effect of this section is that a maintenance order in respect of a child shall not in the first instance extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age unless the court thinks it right in the circumstances to specify a later date (subsection (2)). The

court may not specify a date later than the age of 18 unless it appears to the court that -

(a) the child is or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(b) there are special circumstances which justify the making of the order or provision.

The court may make an order in respect of a child who has attained the age of 18 subject to the same conditions. An order extended beyond or made after the age of 18 may continue indefinitely.

147. There is, therefore, a distinct difference in principle between the magistrates' powers and those of the High Court. The magistrates' maintenance order in respect of a child cannot run beyond the date on which the child reaches the age of 21, whereas the divorce court order may continue indefinitely. We have therefore considered whether the magistrates' powers should be brought into line with those of the divorce court.

148. The principle underlying the powers of the divorce court is clearly that, where a marriage has broken down, the parents are held responsible for the maintenance of their children so long as they are dependent, which is, in most cases, until they leave school. With the ever-increasing opportunities which are available to children for further education, the parents' enforceable obligation to maintain their children will continue until such time as that further

education or training is complete. The 1970 Act, however, envisages that there may be special circumstances, not defined, where the obligation can be thought to continue without reference to the termination of education or training. Section 8(3)(b) was included in the 1970 Act because the Law Commission had received evidence which suggested that public opinion was strongly in favour of giving the court power to protect the interests of children who, for other than educational reasons, were not independent of their parents by the age of majority or who were owed by a parent some form of obligation which, but for the breakdown of the marriage, would have been met.[63]

149. It is to be noted that the State imposes an obligation on parents to maintain their children only up to the age of 16 (section 22 of the Ministry of Social Security Act 1966). It might therefore be argued on grounds of principle that once a child has reached the age of 16 the parents' responsibilities towards it are over and the child takes upon itself, together with the privileges of adulthood, the responsibility of self-support. This view is, however, inconsistent with the principle that has been accepted in the 1970 Act,[64] and we believe that it would generally be thought to be too restrictive. We have therefore considered two possible alternatives.

150. The first would be to preserve the existing position under the magistrates' law, making only such modifications as are necessary to bring the provisions of section 2(1)(h) of the 1960 Act more closely into line with those of section 8 of the 1970 Act. Section 2(1)(h) might thus be replaced by a provision that a maintenance order in respect

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63. *Report on Financial Provision in Matrimonial Proceedi* (Law Com. No. 25), paras. 37-41.

64. Moreover, it would also be inconsistent with the principle that has been accepted in the regulations for students' maintenance grants.

of a child should not in the first instance extend beyond the date of the birthday of the child next following his attaining the upper limit of the compulsory school age unless the court thinks it right in the circumstances to specify a later date. The court should have power to specify a date later than 18, or to make an order in respect of a child over the age of 18 and under 21, if it appears to the court that -

(a) the child is or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(b) the child's earning capacity is impaired through illness or disability of mind or body.

A maintenance order in respect of a child should not run beyond the age of 21.

151. The second approach would be to provide that the powers of the magistrates should be the same as those of the divorce court, i.e. the magistrates should generally have power to award maintenance until the child's majority but they should be able to award maintenance beyond that age if the child is continuing his education or training or if there are "special circumstances".

152. In principle, we think the second approach is to be preferred. It seems to us right that the divorce courts and the magistrates' courts should have the same powers to make orders in respect of children and that whether a particular child of a broken marriage gets maintenance or not

should not depend upon which court deals with the matrimonial dispute. As we noted above, the Law Commission found public opinion strongly in favour of giving the divorce court in appropriate circumstances the power to order maintenance for adult children, and it may be that public opinion would favour similar powers being conferred upon the magistrates. On the other hand, there may be objection to giving the magistrates an unrestricted jurisdiction of this sort. Laymen dispensing justice in numerous local courts up and down the country might have difficulty in exercising consistently so wide and vague a discretion as that conferred by the "special circumstances" provision of section 8(3)(b) of the 1970 Act. It would be possible, of course, to give magistrates guidance as to what constituted special circumstances, e.g. impairment of earning capacity by disablement or illness. But even this would not fully meet the objection to which we have referred. A possible alternative would be to provide that the magistrates should have power to award maintenance until the child's majority (18) and beyond, but that they should award maintenance beyond the age of 18 only in precisely defined circumstances. The two obvious circumstances are where the child is continuing his education or training beyond that age or his earning capacity is impaired by disablement or illness.

153. If magistrates' courts were given jurisdiction to award maintenance to a child beyond its majority either in special circumstances or in precisely defined circumstances such as where the child's earning capacity was impaired by disablement or illness, the magistrates would have power, at least in theory, to order a parent to maintain a child for the rest of his life. Moreover, in a case where the matrimonial breakdown occurred after the child had reached the age of 1 there would be power to award maintenance to an adult child whom the parents had not hitherto been maintaining. The Law Commission[65] recognised that for an order to be made or continued in respect of an adult child some special

65. *Op. cit.*, paras. 39-40.

justification had to be shown. The usual justification would be that the child was still undergoing whole or part-time education or training, but there might be other special circumstances, of which the most obvious example was where the child's earning capacity was impaired through illness or disability. Another circumstance was that where the court wished, on the breakdown of a marriage, to give effect to moral obligations which, but for the breakdown, would have been fulfilled for a temporary period beyond the age of majority. The questions we wish to raise are whether it is desirable or appropriate that the magistrates should have power to make or continue orders beyond the age of majority, and if so whether those powers should be identical with those of the divorce court or more closely defined. It may be that, if the magistrates were given powers to make or continue orders beyond the age of majority, they would so rarely be used that any lack of precision would not lead to difficulty in practice (it is too early yet to say to what extent the divorce court's powers under section 8(3)(b) of the 1970 Act are in fact used). We make no firm proposals and should welcome views.

ORDERS IN GUARDIANSHIP PROCEEDINGS

154. Our proposals concerning orders in respect of children made in matrimonial proceedings may be applied in large measure to orders made in guardianship proceedings. As the law is at present framed, an applicant cannot obtain financial relief under the 1960 Act without alleging that the respondent has committed a matrimonial offence. It not infrequently happens, however, that the applicant is not in a position to obtain financial relief for herself, either because she has committed a matrimonial offence herself or because the sum she is likely to receive by way of maintenance for her children is as much as it is feasible for her husband to pay altogether for the whole of the family. Accordingly, many of the applications for custody and maintenance which are

made under the 1971 Act are, in fact, manifestations of a matrimonial dispute. We do not think there is necessarily anything wrong with this state of affairs. Nor do we wish to change it by, for example, providing some means by which an application for custody of and maintenance for any children of the marriage could be made under the reformulated magistrates' matrimonial law without a matrimonial offence being alleged. On the other hand, we think it right in principle that the magistrates should exercise much the same powers in respect of children whether the proceedings are brought under the matrimonial law or the guardianship law.

155. It is to be noted that the guardianship legislation is concerned with disputes between the natural parents of a child, and therefore the child which comes within its scope is a child of both parents and not a "child of the family" within the meaning of the 1960 Act. With this exception, it seems right to us that the magistrates' powers in the guardianship legislation should be brought into line with the reformulated magistrates' matrimonial law. We suggest that, in guardianship proceedings, there should be express power to award sole custody of a child to either party or to a third party up to the age of 18, and that the power to make a custody order *de novo* after the age of 16 should not be confined, as it is now, to children who are physically or mentally incapable of self-support. (For our proposals concerning custody orders made in matrimonial proceedings, see paragraphs 123-127 above.)

156. Section 2(2) of the Guardianship Act 1973 enables the court (which may be a magistrates' court, a county court or the High Court) in exceptional circumstances to commit a child to the care of a local authority and to order that the child should be supervised by a local authority or probation officer. As regards the ages up to which such orders can be made and can last, the 1973 Act follows the 1960 Act

in providing that an order committing the care of a child under 16 to a local authority terminates at the age of 18, and that a supervision order cannot be made after 16 and any order made before 16 ceases to have effect on the child's attaining that age. We have suggested in paragraphs 137-139 of this Paper that it should be possible to make an order committing a child under the age of 17 to care until the age of 18, and that a supervision order should be capable of being made at any time up to the time when the child reaches 18. We suggest that the powers made available in the Guardianship Act should be amended to the like effect.

157. Section 2(4) of the 1973 Act enables the court, in any case where it adjourns the hearing of an application under section 9 of the 1971 Act for more than seven days, to make an interim order as to maintenance and, where there are special circumstances, as to custody or access. Such an order is subject to an overall time-limit of 3 months. We have proposed in paragraphs 87-91 of this Paper that the powers of magistrates' courts to make an interim order for maintenance in matrimonial proceedings (which section 2(4) reproduces) should be exercisable not only on adjourning the hearing for more than seven days, but also at any time before the hearing; and we have devised a new procedure by which interim orders for maintenance could be made before there has been a hearing. We see no reason why this new power to make an interim order before the hearing should not also be available in guardianship proceedings; but we make this suggestion in the knowledge that the powers made available in section 2(4) of the Guardianship Act are not confined to magistrates' courts but apply also to the High Court and county courts. It may be that, for reasons of court procedure, this new power would not be altogether suitable for use in the High Court and county courts. If so, it could either be confined to magistrates' courts or it could be suitably modified. We invite views as to the appropriate course.

158. We have suggested that the existing powers to make an interim order for maintenance, whether in matrimonial proceedings or in guardianship proceedings, should be exercisable not only on adjourning the hearing for more than seven days, but also at any time before the hearing. It is for consideration whether the linked powers to make an interim order for custody or access should be extended in like manner. We think that, in general, decisions as to custody or access ought not to be made otherwise than by a properly constituted court, with both parties before it, and we are therefore doubtful of the merits of such an extension of the law. But we make no firm proposals and should welcome views.

159. We have suggested in paragraphs 59-61 above that magistrates should be given power in matrimonial proceedings to order the payment of a lump sum and to order periodical payments at such intervals as they consider appropriate. These powers should also be available in guardianship proceedings.

160. At present the age up to which maintenance may be ordered for a child under the 1971 Act is hedged about with various restrictions and is bedevilled with inconsistencies, as may be seen from Appendix 2. A maintenance order in respect of a child may be continued up to the age of 21 (section 12(1)), but a magistrates' court may not make a fresh order after the child attains the age of 16 unless the child is incapable of self-support (section 15(2)). Payment to a child who has attained the age of 18 but is not yet 21 may be made direct to the child (section 12(1)). In the case of a person between 18 and 21 who, while a minor, has been the subject of an order under the 1971 Act, the court may order either parent to pay maintenance to the person himself or to the other parent or to anyone else for the benefit of the child (section 12(2)). We propose that the principle

which are to be applied to orders in respect of children made under the magistrates' matrimonial jurisdiction should equally be applied to their guardianship jurisdiction.

161. The High Court, county courts and magistrates' courts all have jurisdiction under the 1971 and 1973 Acts. If our proposals for changes in the magistrates' powers under these Acts are accepted, we suggest that these changes should apply equally to the powers of the High Court and county courts in guardianship proceedings. We examine the consequences of this proposal more fully at the end of the Paper.

ORDERS IN AFFILIATION PROCEEDINGS

162. Our terms of reference require us to avoid creating anomalies in related Acts by our recommendations for the magistrates' matrimonial jurisdiction. We take the view that this requires us not only to look at the 1971 and 1973 Acts but also to consider certain aspects of the Affiliation Proceedings Act 1957. This Act was a consolidation measure based upon a nineteenth century Act which itself had had a very long legislative history. Review of the 1957 Act generally is outside our terms of reference. There are, however, certain features of it, in particular the provisions relating to the types of order that the magistrates can make, which are affected by the proposals we have made in the course of this Paper. We are aware that not infrequently couples break up who have lived together in a stable union for a number of years without being married and have had children. This is in effect a matrimonial breakdown, even though there is no remedy available to a woman when the man she is living with has ceased to maintain her and all she can do is apply for an affiliation order on behalf of her children. It is outside our terms of reference to consider the liabilities of unmarried couples towards one another, but we see no reason why the courts should not be able to exercise substantially the same powers in respect of illegitimate children, once

paternity has been established, as they exercise in respect of legitimate children.

163. We therefore propose the following adjustments to the 1957 Act. The magistrates should have power to award periodi payments for the child at such intervals as they consider appropriate, and where circumstances warrant it there should be power to order a lump sum payment (beyond the provision, now contained in section 4(2)(b) and (c) of the 1957 Act, which enables the courts to award small lump sums for birth or funeral expenses). Furthermore, we suggest that affiliation orders should have the same age limits as orders for legitimate children. At present an affiliation order ceases at 13 in the first instance, but, if the court so directs, may be continued until the child attains the age of 16 (section 6 of the 1957 Act), after which, on the mother's application, it may be extended by two-yearly periods up to the age of 21 if the child is engaged in a course of education or training (section 7(2) and (3)). Here is yet another variation on the theme of age limits within the magistrates' jurisdiction to deal with children. We suggest that whatever powers are to be available to the magistrates to order maintenance for children of a marriage, the same powers should be available in respect of children born out of wedlock.

VARIATION, REVOCATION ETC

164. So far as the subsequent history of orders in respect of children is concerned, we do not consider that there is any need to alter the existing provisions of the law. These enable the courts to vary, revive or revoke their orders at any time on subsequent application. This power is exercised within the discretion of the court and we see no reason to limit that discretion.

165. This brings to an end our proposals within our terms of reference for changes in the magistrates' family jurisdiction. There is, however, one further matter that we think worth raising in this Paper. During our deliberations about the matters covered by this section of the Paper it was borne in upon us that if our proposals were accepted and if the types of orders in respect of children that the magistrates could make under their matrimonial, guardianship and affiliation jurisdictions were brought more nearly into line, there would emerge a common code of provisions relating to the courts' powers to deal with children. Furthermore this code need not be confined solely to the magistrates' courts, but could also extend to the county courts and the High Court, when they are exercising their matrimonial or guardianship jurisdiction. To avoid the repetition of provisions relating to the custody and maintenance of children in the five statutes (the 1957, 1960, 1970, 1971 and 1973 Acts) under which the courts now exercise their main jurisdiction over children in family matters we think it might be desirable to have some form of uniform child custody and maintenance statute. We have in mind that there might be four separate Acts giving some form of substantive relief, that is to say, divorce, financial provision, appointment of guardians and determination of paternity. Each of these Acts would provide that where such substantive relief was given, the court should exercise its powers in respect of any children involved under a uniform child custody and maintenance statute. A formulation of the law on these lines would make it possible to preclude the double applications for relief under both the 1960 and 1971 Acts. Furthermore it would be possible to amend provisions relating to custody and maintenance of children in one statute at one time rather than having to amend 3 or 4 different statutes with the risk of creating the sort of anomalies that now exist in the law.

166. This is to a great extent a matter of drafting, and in any case we do not wish to divert attention from the matters of substance which we have discussed in the body of the Paper. However, we mention it because we think it worth asking whether a law formulated in this way would be welcomed by practitioners.

PART V

SUMMARY AND CONCLUSIONS

167. For the sake of convenience we set out our proposals in summary form:-

(1) The objectives of the magistrates' matrimonial jurisdiction should be:

(i) to deal with family relations during a period of breakdown which is not necessarily permanent or irretrievable (a) by relieving the financial need which breakdown can bring to the parties, (b) by giving such protection to one or other of the parties as may be necessary, and (c) by providing for the welfare and support of the children; and

(ii) to preserve the marriage in existence, where possible (paragraph 24).

(2) To accord with these objectives, the substantive law administered by and procedure in the magistrates' courts must be such that financial

relief can be obtained without exacerbating the matrimonial dispute. Moreover, in accordance with the summary character of the jurisdiction, financial relief should be cheaply and speedily available, through a simple and readily understandable procedure (paragraph 27).

(3) The objectives of the magistrates' matrimonial law and the divorce law are different: the divorce court exercises its powers to make a maintenance order in respect of a party to a marriage as ancillary to a change of status i.e. after terminating the marriage either by divorce or by judicial separation or by a decree of nullity, whereas when a matrimonial case comes before the magistrates, the marriage has not yet irretrievably broken down and may never do so, and the primary objective is to provide immediate financial relief (paragraphs 29-30).

(4) Whatever the obligations of the parties to a marriage may be towards each other, it can be stated as a clear general principle that both parties should have an absolute obligation to maintain their dependent children, and that obligation should survive irrespective of the way in which they have behaved towards each other (paragraph 33).

(5) The statute law (both matrimonial law and social security law) has been moving towards the proposition that the obligation of each spouse to maintain the other is fully reciprocal. The time has come when the magistrates' matrimonial law too should recognise the duty of

each spouse to support the other, leaving it to the court to determine in particular cases against whom an order should be made and for how much (paragraph 34).

(6) Section 6 of the 1970 Act should be amended accordingly (paragraph 36).

(7) The long list of matrimonial offences provided in section 1 of the 1960 Act should be replaced by three simple grounds on which the magistrates should be able to make an order:

(a) that the respondent has failed to provide such maintenance for the applicant or for any children as is reasonable in all the circumstances; or

(b) that the respondent has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent; or

(c) that the respondent is in desertion (paragraphs 35-44).

(8) In any reformulation of the magistrates' matrimonial law (and of section 6 of the 1970 Act), adultery should not of itself be regarded as an absolute bar to financial relief (paragraph 45).

(9) The principles that should be applied by the Family Division when granting ancillary relief pursuant to the powers conferred by the 1970 Act following dissolution of a marriage were enunciated by the Court of Appeal in

Wachtel v Wachtel.[66] These principles are binding in relation to the divorce jurisdiction, but are not applicable to the existing jurisdiction of the magistrates in matrimonial matters (paragraph 46).

(10) There are four possible approaches to conduct in the magistrates' jurisdiction:

(i) the obligation to maintain should be regarded as absolute and reciprocal and, thus, matrimonial conduct should not be taken into account in determining liability or quantum;

(ii) conduct should be relevant in every case as regards liability, but should not be taken into account in determining the amount of the order;

(iii) conduct should be relevant, both as regards liability and quantum;

and

(iv) conduct should be relevant in every case, both as regards liability and quantum, but if the court decides to make an order, it should not reduce the amount it would have ordered below a sum sufficient to provide the applicant with the basic necessities of life.

We invite views on which approach would be appropriate (paragraphs 48-55).

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66. [1973] Fam. 72.

(11) As regards the factors other than conduct which should be taken into account by the court in determining whether or not to make an order and, if so, for what amount, there is a need for statutory guidance. The court should have regard to the following factors:

(a) the income, earning capacity, property and other financial resources of each of the parties; and

(b) the financial needs, obligations and responsibilities of each of the parties (paragraph 56).

(12) There is no need to formulate specific defences against applications for an order on any of the three grounds proposed (paragraph 57).

(13) Magistrates should not be given powers to order the transfer of property or to make or vary settlements; nor should they be given powers to make orders for secured periodical payments. On the other hand, they should be given power to order the payment of a lump sum for a limited amount (paragraphs 59-60).

(14) Magistrates should be given power, similar to that conferred on the divorce court by section 2(1) of the 1970 Act, to order periodical payments at such intervals as they consider appropriate (paragraph 61).

(15) There is no reason to change the existing statutory provisions regarding variation of an order in favour of a spouse (paragraph 63).

(16) There should be automatic cessation of a maintenance order only if there has been cohabitation for 6 months after the order, whether the cohabitation is continued or resumed (paragraph 65).

(17) There might be advantage if an order on the ground of failure to provide reasonable maintenance made while the parties are cohabiting were enforceable for the period of 6 months before it ceased to have effect (paragraph 66).

(18) The non-cohabitation order, as at present framed, is not an effective way of providing a wife with protection from a violent husband. A new type of remedy in place of the non-cohabitation order should be made available in the form of a "non-molestation order". This should be made only where the court considers the wife needs protection from harm or harassment by the respondent, and should be enforceable under section 54 of the Magistrates' Courts Act 1952 (paragraph 70).

(19) Provision should be made for an order by consent in certain cases where the couple are in agreement about the amount of maintenance and wish to have this agreement given legal force as a maintenance order. There should be power for the court subsequently by order to vary or revoke a consent order on the application of one party and with the consent of the other; but there should be no power for the court to reopen the case on its merits. The court should have power to refuse to make a consent order if it considers that such an order would not be in the best interests of the parties

and their children. The consent procedure should apply to orders for the maintenance of spouses and children, although magistrates should rarely make consent orders in respect of children (paragraphs 73-78).

(20) The existing provisions relating to conciliation contained in section 59 of the 1952 Act are not altogether satisfactory and should be placed on a more regular footing. The reformulated magistrates' law should place on the courts a duty to consider the possibility of reconciliation and to direct the parties' attention to this possibility. It should be expressly provided that, if the court considers at any stage in the proceedings that there is a reasonable possibility of a reconciliation, the court may adjourn the proceedings and may request a probation officer or other person to attempt to effect a reconciliation between the parties (paragraphs 80-82).

(21) There is a need for the magistrates' powers to be extended so as to enable them to make an interim order for maintenance at any time after the applicant makes her initial complaint and a summons is issued. An *ex parte* procedure is unsuitable, but a viable alternative would be a procedure under which, when making her initial complaint, the wife would fill in a simple means questionnaire, which would include a question about her husband's current earnings and employment situation. The means questionnaire, together with the summons (which would be returnable within 21 days), would then be served upon the respondent who would be given an opportunity both to answer a simple means

questionnaire of his own and to make representations within 14 days as to the amount of any interim order or why an interim order should not be made. If no representations were received, the court would make an interim order. Otherwise, both parties would be given an opportunity to present their case either to a magistrates' court constituted for hearing domestic proceedings or, if no such court was available, to a special domestic court consisting of a single magistrate (paragraphs 84-87).

(22) The respondent should not be compelled to complete a means questionnaire, but the applicant should be. Applicant and respondent alike should be subject to penalties if they knowingly give false information in their questionnaires. Evidence given before the single magistrate should be on oath. Any means questionnaires submitted to the court should be admissible in evidence, though they should not be used in place of oral evidence as to means if challenged (paragraphs 88-90).

(23) The magistrates should retain their existing powers under section 6(1)(a) of the 1960 Act to make an interim order on adjourning the proceedings for any period greater than one week (paragraph 91).

(24) The High Court should have power on appeal, if it thinks fit in all the circumstances of the case, to antedate any interim order which it makes to a date not earlier than the date of application to the magistrates' court for a

matrimonial order; and power, on an application by the person liable to make payments under a magistrates' order, if it thinks fit in all the circumstances of the case, to order the person in whose favour the order was made to repay some or all of the sums received by that person as payment under the order (paragraphs 95-98).

(25) It should be expressly stated that maintenance can be ordered to be paid from a date earlier than the hearing, but not earlier than the date of application for the order; or from such date after the hearing as the magistrates think appropriate (paragraphs 99-100).

(26) There should be introduced into the magistrates' procedure some very simple form of "pleadings". The summons should inform the respondent of the ground upon which the applicant is applying for an order and he should be requested to indicate whether he proposes to contest the application and, if so, on what ground (paragraph 103).

(27) In order that subsequent courts may be aware of the factors which the original court took into account in determining the amount of a maintenance order, a simple procedure should be introduced under which the original court should be required to record the factors taken into account in determining the amount of the order. The record should be available as of right to the parties and admissible in any subsequent proceedings as evidence (paragraphs 105-106).

(28) Jurisdiction to hear an application for an order should be established by rules of court, and complaint should be made to a magistrates' court acting for the county (paragraphs 108-109).

(29) Section 5 of the 1960 Act should be retained pending further consideration of the jurisdiction of the various courts empowered to deal with family matters by the Family Courts Working Party (paragraph 112).

(30) The existing definition of "child of the family" in the 1960 Act should be replaced by that in the 1970 Act (paragraph 123).

(31) The magistrates should be given express power to make custody orders which last until the child reaches the age of 18, and they should have the same powers to make custody orders *de novo* in respect of children between the ages of 16 and 18 as the High Court (paragraphs 125-126).

(32) Provision should be made for the court at its discretion to leave equal rights of custody with both parents but to give care and control of a child to one parent and to order the other to contribute towards the child's maintenance (paragraph 128).

(33) Magistrates should be given an express statutory discretion to stay the execution of a custody order, and guidance as to the circumstances in which such a power might be used (paragraph 131).

(34) The financial penalties provided in section 54 of the Magistrates' Courts Act 1952 have been

overtaken by inflation and should be increased (paragraph 132).

(35) We invite views on the proposition that magistrates' courts should be given power to prohibit the removal of a child from the jurisdiction (paragraphs 133-136).

(36) The age up to which, in exceptional circumstances, a child may be committed to the care of a local authority by the magistrates should be raised to 17. The magistrates' powers to order the supervision of a child by a local authority or a probation officer when the child is committed to the custody of one of its parents or a third party should be brought into line with the powers of the High Court (paragraphs 137-139).

(37) The magistrates should be able to make orders of the same nature in respect of children as in respect of spouses (paragraph 141).

(38) Where the magistrates propose to make a maintenance order in respect of a child, the only additional factor to which they should have regard in determining the amount of the order should be the financial needs of the child (paragraph 144).

(39) The age limits up to which maintenance may be ordered by the magistrates should be brought more closely into line with those provided in the divorce jurisdiction (paragraphs 147-153).

(40) There should be an express power in guardianship proceedings to award custody up to the

age of 18, and the magistrates' power to make a custody order *de novo* after the age of 16 should not be confined, as it is now, to children who are physically or mentally incapable of self support (paragraph 155).

(41) Section 2(2) of the Guardianship Act 1973 should be amended so as to provide that orders committing a child to care may be made up to the age of 17, but not later than 18, and that supervision orders should be capable of being made at any time up to the time when the child reaches 18 (paragraph 156).

(42) There should be power to make interim orders for maintenance in guardianship proceedings at any time before the hearing (paragraph 157).

(43) Powers to order the payment of a lump sum and to order periodical payments at such intervals as are considered appropriate should be made available in guardianship proceedings; and the same principles which are to be applied to orders in respect of children made under the matrimonial law should be applied in guardianship proceedings (paragraphs 159-160).

(44) Once paternity has been established, the courts should be able to exercise substantially the same powers in affiliation proceedings as they exercise in respect of legitimate children. Adjustments are therefore necessary to the Affiliation Proceedings Act 1957, providing for the magistrates to order periodical payments at such intervals as they consider appropriate and the payment of a lump sum. The age limits up to which affiliation orders may run should be brought into line with those

in the reformulated magistrates' matrimonial law (paragraphs 162-163).

(45) There is much to be said for some form of uniform child custody and maintenance statute. There might be four separate Acts giving some form of substantive relief, that is to say, divorce, financial provision, appointment of guardians and determination of paternity, each of which would provide that where such substantive relief was given, the court should exercise its powers in respect of any children involved under a uniform child custody and maintenance statute (paragraphs 165-166).

APPENDIX 1

Divorce Reform Act 1969

Until the coming into operation of the Divorce Reform Act 1969 the basis of our divorce law was the commission by one spouse of a matrimonial offence on which the other grounded a petition for the dissolution of marriage. The 1969 Act substituted for the matrimonial offence the irretrievable breakdown of the marriage. The Act provides that the sole ground on which a petition for divorce may be presented is that the marriage has broken down irretrievably; but a court hearing a petition for divorce must not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts:-

"(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted;

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition."

The previous absolute bars to divorce, namely connivance, collusion and condonation, and the discretionary bars, of

which the principal one was the petitioner's adultery, are abolished.

The Act also provides that the five facts mentioned above are in future to be the grounds for judicial separati which would be obtainable without proof of irretrievable br down.

Matrimonial Proceedings and Property Act 1970

Part I of the Matrimonial Proceedings and Property Act 1970 extends the powers of the court to award financial provision after a divorce, a decree of nullity or a decree of judicial separation. The court now has power under sections 2 and 4 of that Act to make an order:-

(a) for the making of periodical payments,

(b) for the making of secured periodical payments,

(c) for the payment of a lump sum,

(d) for the transfer of property,

(e) for the settlement of property, and

(f) for the variation of ante-nuptial and post-nuptial settlements.

In exercising these powers the court is directed to have regard to all the circumstances of the case, including the following matters:-

"(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

Under section 6 of the 1970 Act, a wife may apply to the court for an order on the ground that her husband has wilfully neglected to maintain her; and a husband, if his earning capacity has been impaired through age, illness or disability, may apply for an order on the ground that his wife has wilfully neglected to maintain him. The court on such an application has power to order the making of periodical payments, including secured payments, and the payment of a lump sum.

Matrimonial Proceedings (Magistrates' Courts) Act 1960

The grounds on which an application for an order in the magistrates' courts may be made are governed by the provisions of section 1 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960. Desertion, cruelty and adultery are still grounds on which a matrimonial order under

the 1960 Act may be made but they are not in themselves grounds for a divorce. Moreover, although the previous bars to divorce have been repealed by the Divorce Reform Act, in the magistrates' courts adultery by the applicant is still a bar to an order unless the respondent has condoned or connived at or by his conduct conduced to that act of adultery. Adultery by the applicant is also, subject to the same qualifications, a ground for the revocation of an order.

In the magistrates' courts cohabitation for not more than three months does not operate as condonation of an offence if the cohabitation took place with a view to effecting a reconciliation. In the case of divorce and judicial separation no account is taken of any periods (not exceeding six months in aggregate) during which the parties lived together after the incident complained of, or after one party has learnt of the adultery of the other.

The grounds on which an order may be applied for, whether by husband or wife, are:-

(a) desertion,

(b) adultery,

(c) persistent cruelty to the applicant or a child,[67]

(d) that the respondent has been found guilty on indictment of an assault upon the applicant,

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67. "child" means - (a) infant child of applicant (including an adopted or illegitimate child) and

(b) infant child of respondent (including an adopted or illegitimate child) who is a child of the family.

(e) that the respondent has been found guilty by a magistrates' court of certain offences against the applicant under the Offences against the Person Act 1861,

(f) that the respondent has committed or attempted to commit an indecent assault on a child,

(g) that the respondent is an habitual drunkard or drug addict,

(h) that the respondent has insisted on sexual intercourse while knowingly suffering from a venereal disease,

(i) if the applicant is the wife, that the husband has compelled her to submit to prostitution,

(j) if the applicant is the wife, that the husband has wilfully neglected to provide reasonable maintenance for the wife or a child of the family,[68] and

(k) if the applicant is the husband and his earning capacity is impaired through age, illness or disability, that the wife has wilfully neglected to provide reasonable maintenance for her husband or a child of the family.

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68. "child of the family" means (a) any child of both parties and

(b) any other child of either party who has been accepted as one of the family by the other party.

On hearing an application the court may make one or more of the following orders:-

(a) a non-cohabitation order,

(b) an order for the payment of a weekly sum by the husband for his wife or child,

(c) if the husband's earning capacity is impaired, an order for the payment of a weekly sum by the wife for her husband or child,

(d) an order for the legal custody of a child of the family, who is under 16,

(e) an order for access to a child of the family,

(f) an order committing a child to the care of a local authority, and

(g) a supervision order.

Orders for maintenance are suspended while the parties are still living together and cease to have effect if the parties begin to live together again. The Act contains provision for the making of interim orders, lasting not more than three months, for maintenance, custody and access. There is also power to vary and revoke orders.

A magistrates' court may refuse to make an order if the court considers that the matter would be more conveniently dealt with by the High Court. There is an appeal to the High Court from the making or refusal to make a matrimonial order.

	Divorce (Matrimonial Proceedings & Property Act 1970; Matrimonial Causes Act 1965)	Magistrates' Matrimonial Jurisdiction (Matrimonial Proceedings (Magistrates' Courts) Act 1960)	Guardianship (Guardianship of Minors Act 1971 and Guardianship Act 1973)	Affiliation (Affiliation Proceedings Act 1957; Family Law Reform Act 1969)
1. Custody; which children.	Child of the family who is under 18 (1970, sections 18(1) and 27(1).	Child of the family who is under 16 (1960, sections 2(1)(d)) and 16(1).	Child of both parents under 18 (magistrates' court under 16 unless child incapable of self-support) (1971, sections 9 and 15(2)).	The mother has custody of the child at common law.
2. Custody; until what age.	18	16, or possibly 18	18	Probably 18
3. Custody; to whom.	Such order as the court thinks fit (1970, section 18(1)). Impliedly includes a third person (1965, section 36).	A matrimonial order may include "provision for the legal custody" of the child (1960, section 2(1)(d)). Impliedly includes a third person (1960, section 2(1)(e)).	Such order regarding custody as the court thinks fit (1971, section 9(1)). Includes putative father (1971, section 14(1)). Has been held to include a third person.	Custody may be given to another person by two justices if the mother is in prison, of unsound mind or dies (1957, section 5(4)). 1957, section 5(3) might be taken to imply that custody can be given to or held by another person (not the father) in other circumstances.

	Divorce	Magistrates' Matrimonial Jurisdiction	Guardianship	Affiliation
4. Maintenance; to whom payable and until what age.	The child or such person as may be specified for the benefit of the child (1970, section 3(2)). Up to 18, or without limit if receiving full-time education or in special circumstances (1970, section 8(3)).	Any person having legal custody of the child up to 16. If over 16 but under 21 and a dependant, to the child or such person as may be specified (1960, sections 2(1)(h) and 16(1).	Any person up to 21, but no fresh order by magistrates' court after 16 unless child incapable of self-support (1971, section 9(2) as extended by 1973, Schedule 2; 1971, sections 12(1) and 15 (2)). Payments after 18 can be to the child (1971, section 12(1)). In the case of a person between 18 and 21 who, while a minor, has been the subject of an order under the 1971 Act, the court may order either parent to pay maintenance to the person himself or to the other parent, or to anyone else for the benefit of the person (1971, section 12(2)).	The child's mother up to 21, but order ends at 13 unless directed to continue to 16 (1957 sections 5(1) and 6), and is renewable for two year periods up to 21 on the application of the mother if the child is engaged in a course of education or training (1957, section 7(2) and (3)). If the mother is of unsound mind, in prison, or dies, payments may be made to the person to whom custody is given, and after the child is 18 to the child itself (1957, sections 5(4) and 7(6); 1969, section 5(2)). Payments may also be made to any person having custody of the child either legally or by an arrangement

		monial Jurisdiction		
5. Maintenance; by whom payable.	Either party to the marriage (1970, section 3(2)).	Either party to the marriage (1960, section 2(1)(h).	Either parent (1971, section 9(2), as extended by 1973, Schedule 2), but not putative father (1971, section 14(2)).	Putative father (1957, section 4(2)).
6. Committal to care.	If child under 17 and there are exceptional circumstances making it undesirable or impracticable for it to be entrusted to either party to marriage or an individual. Ends at 18 (1965, section 36(4)).	If child under 16 and as for divorce (1960, section 2(1)(e)). Ends at 18 (1960, section 3(4)).	If child under 16 and as for divorce (1973, section 2(2)(b)). Ends at 18.	None.
7. Supervision.	If exceptional circumstances make it desirable, so long as custody lasts (i.e. not beyond 18). (1965, section 37(1)).	As for divorce, but cannot be done after 16 and ends at 16. (1960, sections 2(1)(f) and 3(9)).	As for divorce, but cannot be done after 16 and ends at 16. (1973, sections 2(2)(a) and 3(2)).	None.

NOTE: This summary does not take account of provisions by means of which the State or a local authority may apply for the recovery of benefit paid or assistance given in respect of a legitimate or illegitimate child.

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